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No. 09-091433

IN THE

Supreme Court of the United States

SCHAGHTICOKE TRIBAL NATION,
Petitioner-Appellant,

v.

DIRK KEMPTHORNE, Secretary, Department of the Interior, JAMES E. CASON, Associate Deputy Secretary, Department of the Interior, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, and INTERIOR BOARD OF INDIAN APPEALS,
Respondents-Appellees.

THE KENT SCHOOL CORPORATION, STATE OF CONNECTICUT, TOWN OF KENT, and THE CONNECTICUT LIGHT AND POWER COMPANY,
Intervenors-Appellees.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether certiorari should be granted to resolve a conflict among the Courts of Appeals on this question: when reviewing a petitioner's Due Process claim that undue political pressure has *actually* affected or influenced a federal administrative *adjudicative* decision, must a federal court also consider the petitioner's claim that Due Process was violated by the *appearance* of bias or impropriety arising from the political pressure.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Schaghticoke Tribal Nation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, rendered on October 19, 2009, and amended on November 4, 2009.

OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Second Circuit, in *Schaghticoke Tribal Nation v. Kempthorne et al.*, is officially reported at 587 F.3d 132 (Oct. 19, 2009) (Cabranes and Miner, *Circuit Judges*, and Korman, *District Judge*) (*per curiam*), and is reproduced in the Appendix to this petition, at 62a-67a. The Court of Appeals amended its opinion on November 4, 2009, and the amended opinion is reproduced in the Appendix at 68a-75a. The District Court's Ruling on Cross-Motions for Summary Judgment (Hon. Peter C. Dorsey), is officially reported at 587 F. Supp. 2d 389 (2008), and is reproduced in the Appendix at 1a-59a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 19, 2009. On November 25, 2009, the Petitioner filed a combined Petition for Rehearing and Petition for Rehearing *En Banc*. See Appendix 76a-110a. The Court of Appeals denied the petitions in an Order issued on February 24, 2010. See Appendix 111a-112a. On March 24, 2010, the Court of Appeals granted the Petitioner's motion to stay issuance of the mandate until May 25, 2010. See Appendix 113a-114a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part: ". . . nor shall any person ... be deprived of life, liberty, or property, without due process of law. . . ."

5 U.S.C. § 706 provides in pertinent part:

> "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity . . . ."

25 U.S.C. § 177 provides: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $ 1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands

within such State, which shall be extinguished by treaty."

28 U.S.C. § 1254 provides in pertinent part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;. . . ."

Conn. Gen. Stat. § 47-59a provides:

> "(a) It is hereby declared the policy of the state of Connecticut to recognize that all resident Indians of qualified Connecticut tribes are considered to be full citizens of the state and they are hereby granted all the rights and privileges afforded by law, that all of Connecticut's citizens enjoy. It is further recognized that said Indians have certain special rights to tribal lands as may have been set forth by treaty or other agreements.
>
> (b) The state of Connecticut further recognizes that the indigenous tribes, the Schaghticoke, the Paucatuck Eastern Pequot, the Mashantucket Pequot, the Mohegan and the Golden Hill Paugussett are self-governing entities possessing powers and duties over tribal members and reservations. Such powers and duties include the power to: (1) Determine tribal membership and residency on reservation land; (2) determine the tribal form of government; (3) regulate trade and commerce on the reservation; (4) make contracts, and (5) determine tribal leadership in accordance with tribal practice and usage."

STATEMENT OF THE CASE

This petition arises from a twenty-nine-year quest by a Connecticut Indian tribe, the Schaghticoke Tribal Nation (STN or Tribe), to attain federal "acknowledgment." It presents an issue that is far from being uniquely "Indian." In fact, this is an administrative law case. The Petitioner's principal contention is that in the context of a federal administrative *adjudicative* decision, a litigant's due process right to a fair hearing may be violated by the "appearance of bias" or impropriety. It is an issue that can affect *any* litigant in *any* adjudicative proceeding before *any* federal agency.

As explained *infra*, in January 2004 the Petitioner received a *favorable* decision (the Final Determination, or FD) on its petition for federal acknowledgment. But that decision triggered an avalanche of political opposition, based on politicians' and citizens' fears of a third Indian casino[1] in the Constitution State. Twenty months later, in October 2005, the Bureau of Indian Affairs (BIA) issued a Reconsidered Final Determination (RFD) *denying* federal acknowledgment. Such a rescindment is exceedingly rare.

Following the rejection of its petition for acknowledgment, the Tribe filed a Petition for Review in the United States District Court for the District of Connecticut. That Petition claimed, *inter alia*, that the RFD was "arbitrary and capricious"; that the RFD was the result of undue political influence; and that

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[1] Foxwoods Resort Casino is run by the Mashantucket Pequot Tribe, which was recognized by Congress in 1983. See 25 U.S.C. § 1751 et seq. The Mohegan Sun Casino is operated by the Mohegan Tribe, which was acknowledged under the regulations in 1994. See 59 Fed. Reg. 12140 (March 15, 1994).

the RFD had been issued by an unauthorized decisionmaker. The District Court decided the Petition for Review by directing the parties to file cross-motions for summary judgment. The Court denied the Petitioner's motion for summary judgment, and granted the cross-motions for summary judgment filed by the Respondents and Intervenors.

The Tribe appealed to the United States Court of Appeals for the Second Circuit, invoking its appellate jurisdiction under 28 U.S.C. § 1291. In that appeal, the Tribe abandoned its challenge to the merits of the RFD, and challenged only the fairness of the process by which the RFD was reached. Specifically, the Tribe claimed that the RFD resulted from undue (and improper) political influence, or from the appearance of bias, and that the RFD was issued by an unauthorized decisionmaker. The case was argued on October 8, 2009, and on October 19, 2009, the Court of Appeals issued a *per curiam* opinion rejecting the Tribe's claims. (An amended *per curiam* opinion was issued on November 4, 2009.) The Tribe's petitions for panel rehearing and for rehearing en banc, were denied on February 24, 2010. See Appendix 76a-110a.

Introduction and Overview: 275 Years of State Recognition

There is no question about the Tribe's historical pedigree. The first "Scatacook" settlement was established in the early eighteenth century, near the banks of the Housatonic River, in the Town of Kent, Connecticut, and the Connecticut Colony first reserved land for the Tribe's use in 1736. By statute, Connecticut recognizes the Tribe as one of five "indigenous tribes" that are "self-governing entities possessing powers and duties over tribal members and reservations." Conn. Gen. Stat. § 47-59a(b). As the Connecticut

Supreme Court has noted, "[t]he Schaghticoke are a state-recognized tribe of Indians who possess a state-recognized reservation in Kent." *Schaghticoke Tribal Nation v. Harrison*, 264 Conn. 829, 831, 826 A.2d 1102 (2003).

Despite *state* recognition, the Tribe sought federal acknowledgment from the Department, since acknowledgment "is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. §83.2. Once acknowledged, a tribe "is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." *Id.*

Of special importance in this case, those protections, benefits, and immunities include the ability to prosecute and defend claims concerning tribal lands, pursuant to the Indian Nonintercourse Act, 25 U.S.C. § 177. It was *land* that provided the imperative for the Tribe's filing of a petition for acknowledgment in 1981.

Now, however, the Tribe's request for federal acknowledgment is overshadowed by "the proverbial 800 pound gorilla." *Lake v. Reno*, 226 F.3d 141, 144 (2nd Cir. 2000), overruled in part by *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001). The gorilla in this case is the "right" of a federally acknowledged tribe to enter into a gaming compact with a state, in order to operate a gaming casino, under the authority of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701-2721, enacted in 1988. As the District Court noted, "the cultural climate of the last dozen years has created a tendency to equate tribal acknowledgment with casino

development." Ruling on Cross-Motions for Summary Judgment, at Appendix 19a, n.4.

It is important to emphasize that this petition is *not* "factbound." Nor does it involve the application of settled doctrine to specific facts. The factual exposition that follows is intended to illustrate why an "appearance of bias" standard—a standard commonly recognized and applied in the *judicial* system—is so essential to maintaining the integrity of *adjudicative* (quasi-judicial) decisions in the federal *administrative* process.

In Section I *infra*, the Petitioner reviews the proceedings to date in the agencies and courts below. Section II provides a summary of the political events that fueled the "political influence" claim. In Section III, Petitioner explains how that claim was raised and decided in the courts below.

I. ADMINISTRATIVE AND JUDICIAL PROCEEDINGS (1975-2010)

A. 1975 through 2000

On December 14, 1981, the Tribe filed a Letter of Intent (under 25 C.F.R. § 83.4) requesting acknowledgment as an Indian tribe. The Tribe was a plaintiff in three land claim actions (filed in 1975, 1998, and 2000[2]) seeking restoration of original reservation lands. It was also a defendant in a 1985 case brought by the federal government, seeking to condemn a por-

[2] *Schaghticoke Indians, et al., v. Kent School Corporation, et al.*, No. 2:75-cv-00125-PCD (the 1975 land claim action); *Schaghticoke Tribal Nation v. Kent School Corporation, Inc., et al.*, No. 3:98-cv-01113-PCD (the 1998 land claim action); *Schaghticoke Tribal Nation v. United States of America and The Connecticut Light and Power Company, et al.*, No. 3:00-cv-00820-PCD (the 2000 land claim action).

tion of the reservation for use as part of the Appalachian Trail.[3] Federal "acknowledgment" was deemed essential in order for the Tribe to prosecute and defend the land claims.

The Tribe filed its first "documented" petition, see 25 C.F.R. § 83.6, on December 7, 1994, and six years later it was still awaiting consideration.

B. A Federal Judge Assumes Control of the Tribe's Cases (2000-2001)

The 1985 condemnation case and the 1998 and 2000 land claim actions all were assigned to Judge Peter C. Dorsey of the United States District Court for the District of Connecticut. Eventually, he ordered the three cases consolidated "on the basis that the cases involve common questions of fact and law." Order of Consolidation, at Appendix 129a-130a.

In 2000, because of inordinate delays at the BIA, Judge Dorsey effectively "assumed control" of the acknowledgment process with respect to STN's petition. See Ruling on Pending Motions, 2:85-cv-01078 (PCD) and No. 3:98-cv-01113 (PCD) (Sept. 11, 2000); Ruling on Pending Motions, at 2 (Doc. #93 in 3:06-cv-00081 (PCD)) (Nov. 3, 2006). The Court agreed to let the BIA remain involved in the process, but instructed all parties and *amici* to develop a Scheduling Order, that he approved on May 8, 2001. See Appendix 120a-128a.

The Scheduling Order established a framework for the BIA's determination of STN's petition, set deadlines, provided for discovery, mandated the creation

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[3] *United States of America v. 43.47 Acres of Land, More or Less Situated in the County of Litchfield, Town of Kent, et al.*, 855 F. Supp. 549 (D. Conn. 1994) (the 1985 condemnation action).

of a database, and provided for judicial review of final agency action. See *id.*, at 121a-128a. The Scheduling Order also prohibited *ex parte* communications between non-federal parties or *amici* and certain officials within the Department of the Interior, including the Secretary of the Interior. *Id.*, at 127a.

The Scheduling Order was significant beyond its individual provisions, for it reflected the fact that *since May 8, 2001, the federal administrative process involving STN's petition for acknowledgment has been under the ultimate supervision and control of a federal judge—with all parties and amici participating in the process.*

C. The Negative Proposed Finding (Dec. 2002)

STN's petition for acknowledgment went on active consideration on June 5, 2002. On December 5, 2002, the Assistant Secretary-Indian Affairs (AS-IA), Neal McCaleb, issued a Proposed Finding (PF) recommending *against* tribal recognition, notice of which was published in the Federal Register. See 67 Fed. Reg. 76184 (Dec. 11, 2002). The PF was based on a determination that the STN did not satisfy the criteria for "community" and "political influence or authority" as required in 25 C.F.R. 83.7(b) and (c), respectively.

D. The Briefing Paper and Positive Final Determination (Jan. 2004)

Following issuance of the PF, additional comments were filed by interested parties during the "comment period." The STN responded to the comments by filing additional genealogical and historical data on September 29, 2003.

On January 12, 2004, the Office of Federal Acknowledgment (OFA), a subagency within the BIA, prepared a "Briefing Paper" setting forth issues and options with respect to the STN petition. Noting that "[t]he Schaghticoke have been a continuously state-recognized tribe with a state reservation throughout their history," the Briefing Paper identified two factors under the heading, "Unique Circumstances for Evaluation":

> *There is no previous case* where there is little or no direct evidence of political influence within the group for extended periods even though the existence of community is well established throughout the petitioner's entire history, including the two periods when evidence of political processes is very limited.
>
> *There is no previous case* where a petitioner meets all of the criteria from earliest sustained contact for over 100 years, does not meet one of the criteria during two separate, substantial historical periods and then meets all of the criteria for a substantial period up to the present . . .

(Emphasis added.) *Id.*

After discussing four possible options, the OFA recommended that the AS-IA "[a]cknowledge the Schaghticoke under the regulations despite the two historical periods with little or no direct political evidence, based on the continual state relationship with a reservation and the continuity of a well defined community throughout its history." *Id.* The OFA recommended this option "on the grounds that it is the most consonant with the overall intent of the regulations." *Id.*

On January 29, 2004, Principal Deputy AS-IA Aurene M. Martin issued a Final Determination (FD) acknowledging the STN as an Indian tribe within the meaning of federal law. Notice of the decision was published in the Federal Register. See 69 Fed. Reg. 5570 (Feb. 5, 2004), at Appendix 131a-147a. The FD concluded that the criteria of "community" and "political influence or authority" had been met, *inter alia*, by evidence of the historic state recognition of the Schaghticoke by the State of Connecticut, as well as evidence of a state-maintained reservation dating back to colonial times. Secretary Norton participated in discussions leading up to the FD, and she believed that it was a correct decision reached on its merits. Norton Dep., 47:1-48:10.

In 2006, Aurene Martin stated that "[t]he consensus among the OFA's highly trained research staff was that the STN Petition was among the best and most thoroughly researched petitions ever reviewed by the BIA." Decl. of Aurene M. Martin, ¶ 5 (July 18, 2006).

E. The Supplemental Transmittal

On May 3, 2004, the State of Connecticut, the Kent School Corporation, The Connecticut Light & Power Company, the Town of Kent, and other interested parties, filed Requests for Reconsideration of the FD with the Interior Board of Indian Appeals ("IBIA"). *In re Federal Acknowledgment of the Schaghticoke Tribal Nation*, 41 IBIA 30, 31 n. 1 (2005). The Tribe's opponents objected to the FD's use of "state recognition" evidence, and claimed, *inter alia*, that the FD applied an improper methodology in its calculation of marriage rates among STN members. *Id.*, 34-35.

On November 29, 2004, the STN submitted a response to the Requests for Reconsideration. Just three days later, on December 2, 2004—*after* STN had filed its responsive brief—the OFA staff filed a "Supplemental Transmittal" memorandum with the IBIA, calling into question the marriage rate analysis it had used for the STN FD. Submitted by Barbara Coen, an attorney in the Department's Office of the Solicitor, the Supplemental Transmittal was significant because marriage rates are a relevant factor in satisfying one or more of the acknowledgment criteria. The document conceded that there are "different ways" of validly measuring "marriage within a group," but it asserted, *inter alia*, that the calculation method used in the FD was inconsistent with precedent, and that the analysis "should not be affirmed on these grounds absent explanation or new evidence."

F. The Final Determination is Vacated and Remanded

On May 12, 2005, the IBIA vacated the FD and remanded it to the AS-IA "for further work and reconsideration." *In re Federal Acknowledgment of the Schaghticoke Tribal Nation*, 41 IBIA 30, 42 (2005). That remand was based principally on a holding in another case decided by the IBIA the same day, also involving a Connecticut tribe, see *In re Federal Acknowledgment of the Historical Eastern Pequot Tribe*, 41 IBIA 1 (2005), in which the IBIA clarified how evidence of "state recognition" could be used to satisfy the criteria for federal acknowledgment.

G. James E. Cason and the Reconsidered Final Determination (RFD)

On August 9, 2001, Secretary Norton appointed James E. Cason to serve as Associate Deputy Secretary of the Department. It was a *political* appointment.

On February 13, 2005, Secretary Norton delegated the duties and authority of the office of the AS-IA to Cason, because the positions of AS-IA and Principal Deputy AS-IA were both vacant.

The STN petition was Cason's first acknowledgment decision. Cason Dep., 90:14-16; 102:10-12; 120:5-8. Prior to issuing the RFD, he "only had one substantive conversation" with OFA staff (on October 5, 2005) about the STN petition. Cason Dep., 32:1-15; 88:11-18; 96:19-21, 97:4-99:7; Cason Decl., ¶¶ 7-9. OFA Director Fleming, OFA staff members, and two or three attorneys from the Solicitor's Office, including Barbara Coen, were present at the meeting. Cason Dep., 88:19-90:11; 96:6-8; 102:17-103:9.

As a result of Norton's meetings with the Connecticut congressional delegation, see *infra*, Cason knew the delegation was opposed to STN acknowledgment. Cason Dep., 34:19-35:6; 37:11-17, 68:2-12. Since he "knew the [STN] issue was controversial," at the October 5 meeting he asked the staff if any of them felt pressured to reach a particular result, and received negative responses. Cason Dep., 91:2-92:1; 100:17-101:3; Cason Decl., ¶ 11 (Sept. 29, 2006). He knew that if he went with the staff recommendation and denied the petition, "the Schaghticoke would be *upset*," but that if he acknowledged STN, "the other parties would *take us to task*." (Emphases added.) Cason Dep., 101:13-20.

Cason essentially adopted the recommendation of Fleming and the OFA staff. Cason Dep., 102:13-16. On October 11, 2005, Cason issued the RFD, declining to acknowledge the STN. Cason Dep., 129:19-22. Notice of the RFD was published in the Federal Register. See 70 Fed. Reg. 60101 (Oct. 14, 2005), at Appendix 148a-156a. The RFD concluded that the STN did not satisfy the criteria for "community" under 83.7(b), or for "political influence or authority" under 83.7(c).

H. The Petition for Review in the District Court

The STN filed a Petition for Review (later amended) in the District Court on January 12, 2006, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 551 et. seq., and the provisions of the Scheduling Order. See Appendix 125a-127a. The Petition claimed that the RFD was arbitrary and capricious, that it had been affected by undue political influence, and that it had been issued by an unauthorized decisionmaker. First Amended Petition for Review, ¶¶ 76-78. On June 14, 2006, the District Court granted "permissive intervention" status to the State of Connecticut, the Town of Kent, the Kent School Corporation, and The Connecticut Light and Power Company.

I. Discovery Proceedings in the District Court

On June 15, 2006, the Federal Defendants filed the Administrative Record, containing 6,774 distinct documents comprising 47,012 pages.

Incident to the Petition for Review, the STN moved for discovery on "the question of whether improper political pressure influenced [the] Respondents' decision

to deny the Tribe's petition for federal acknowledgment." Petitioner's Motion for Leave to Take Discovery (Doc. # 58) (Aug. 9, 2006). As Judge Dorsey noted, review of federal agency decisions is normally limited to the Administrative Record, unless a litigant makes a "strong showing," *Citizens to Preserve Overton Park*, 401 U.S. 402, 420 (1971), in support of a claim that improper political influences had been exerted on decisionmakers at the Department. Ruling on Pending Motions, at 7 (Doc. # 93) (Nov. 3, 2006).

In this instance, Judge Dorsey found that STN's evidence of alleged political pressure "do[es] raise some questions," and that STN's allegations regarding Secretary Norton and Associate Deputy Secretary Cason were "sufficient to warrant further discovery into the question of whether there was bad faith or improper behavior on their parts." *Id.*, at 10-11. Judge Dorsey initially allowed the STN to depose Norton and Cason. *Id.*, at 11. Based on information developed at their depositions, he allowed additional depositions of R. Lee Fleming, David Bernhardt (the Department's Director of Congressional and Legislative Affairs, and Counselor to Secretary Norton), and Loren Monroe (Chief Operating Officer of Barbour, Griffith & Rogers, LLC, a lobbying firm). However, Judge Dorsey denied the STN's requests to depose Barbara Coen (author of the Supplemental Transmittal); see Ruling on Petitioner's Motion for Additional Limited Discovery and on Petitioner's Motion for Leave to Amend Complaint, at 15-16 (Doc. # 119) (March 19, 2007); and Aurene Martin (who issued the FD). See Ruling on Petitioner's Motion to Take Deposition and for Discovery of Specified Records of the White House and the Department of the Interior, at 6-9 (Doc. # 156) (July 26, 2007). Judge Dorsey also

denied the Tribe's request for discovery of certain White House records. *Id.*, at 4-9.

J. The Summary Judgment Motions and the District Court's Ruling

Judge Dorsey directed the parties to file cross-motions for summary judgment. *Id.* at 9. He denied the Tribe's request for oral argument. On August 22, 2008, he issued a ruling denying the Tribe's Motion for Summary Judgment, and granting the Cross-Motions for Summary Judgment filed by the Federal Defendants' and the Intervenors-Respondents. See Appendix 1a-59a.

K. The Appeal to the Second Circuit

The Tribe appealed to the United States Court of Appeals for the Second Circuit, raising two issues: whether the Tribe's due process right to a fair hearing was violated by undue political influence, and whether the RFD was issued by an unauthorized official. The Court of Appeals rejected both claims in a *per curiam* opinion issued on October 19, 2009 (amended November 4, 2009), and declined to address the "appearance of bias" claim.

L. The Petition for Panel Rehearing and for Rehearing *En Banc*

The following sentence appears in the panel's decision: "Any political pressure, moreover, was exerted upon *senior* Interior Department officials; there is no evidence that any of the pressure was exerted upon [James E.] Cason, who was the official ultimately responsible for issuing the Reconsidered Final Determination." (Emphasis added.) See Appendix 73a. In its petition for panel rehearing, the Tribe pointed

out that the implication that Cason was *not* a "senior" official, was refuted by the record. The Department's own lawyers described Cason's position of Associate Deputy Secretary as "[t]he *most senior* staff position" in the Department. (Emphasis added.) Brief for Respondents-Appellees, at 71. And Secretary Norton, who appointed Cason to the Associate Deputy Secretary position, described him as being part of her top "leadership" group. Norton Dep., 172:9-19, 174:15-19, 282:8-11. Nevertheless, the Court of Appeals denied the petition for panel rehearing, and denied the Tribe's request to amend the amended opinion to accurately reflect the fact that Cason was a political appointee of Norton's.

In a petition for rehearing *en banc*, the STN asked the Court of Appeals to modify or overrule the "political influence" standard adopted in *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2nd Cir. 1984). The *en banc* petition was denied. See Appendix 111a-112a.

II. THE "POLITICAL INFLUENCE" CLAIM: AN OVERVIEW

Within hours of issuance of the Final Determination on January 29, 2004, Connecticut politicians launched a public and private campaign to overturn the decision:

Item 1. Secretary Norton did not recall meeting with members of the Connecticut Congressional delegation (the delegation) at any time *prior* to issuance of the FD on January 29, 2004. Norton Dep., 280:16-22. But shortly after, and within the space of thirty days, she was subjected to three meetings with members of

the delegation.[4] At those meetings, the politicians expressed their opposition to further casino development in Connecticut, and urged her to reverse the FD—a decision in which she had participated, and which she believed was correct on its merits.

Item 2. In 2004 and 2005—after the issuance of the FD (Jan. 29, 2004), but prior to issuance of the IBIA's ruling vacating the FD (May 12, 2005)—the STN FD was sharply criticized at three Congressional hearings (on March 31, 2004,[5] May 5, 2004,[6] and May 11, 2005[7]). At those hearings, Connecticut politicians called on Congress to invalidate the STN FD.

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[4] On March 4, Representative Christopher Shays met with Norton at Norton's office. On March 30, 2004, Norton met with Representatives Shays, Nancy Johnson (whose district included the Town of Kent), Rob Simmons (whose district included Connecticut's two existing casinos), and Frank R. Wolf of Virginia, at the latter's office. On April 1, 2004, Norton went to Capitol Hill and met with Senators Christopher Dodd and Joseph Lieberman, and Representatives Johnson, Shays, and Rosa DeLauro.

[5] See Oversight Hearing before the House Committee on Resources, *Federal Recognition and Acknowledgment Process by the Bureau of Indian Affairs*, 108th Cong., 2d Sess. (2004).

[6] See Hearing before the House Committee on Government Reform, *Betting on Transparency: Toward Fairness and Integrity in the Interior Department's Tribal Recognition Process*, 108th Cong., 2d Sess. (2004). At the hearing, Representative Frank Wolf of Virginia observed that if prior Secretaries could see what was happening, the Department "would be held in disgrace." *Id.*, 55. He added that the Department had made a mistake, and that, if not fixed, "*the fault will lie at the steps of Secretary Gale Norton* and this administration." (Emphasis added.) *Id.*

[7] See Oversight Hearing before the Senate Committee on Indian Affairs, *Federal Recognition*, 109th Cong., 1st Sess. (2005). Testifying at the hearing were Senators Dodd and

Item 3. Between March and May of 2004, every member of the Connecticut delegation, as well as Connecticut Attorney General Richard Blumenthal and several dozen Connecticut state legislators, demanded one or more "investigations" into what they claimed was an "unlawful" or "illegal" decision.

Item 4. While the requests for reconsideration of the FD were under review by the IBIA, three members of the delegation wrote to the Chief Administrative Judge, expressing their views on the merits of reconsideration. Their letter prompted a response from the Judge, reminding the Representatives that the IBIA proceeding was a "formal administrative proceeding, governed by regulations that prohibit *ex parte* communications."

Item 5. In July 2004, Representative Johnson requested a meeting with the BIA so that she could deliver 8,000 survey postcards from her constituents, indicating their position in favor of, or opposition to, construction of a casino in western Connecticut. In an email, a BIA staff member described Johnson's effort as "a PR ploy connected to her opposition to recognizing new tribes in her State." In a responsive email, OFA Director Fleming concurred with that assessment, and added: "[l]astly, *I view this as pressure from an elected official.*" (Emphasis added.)

Item 6. Much of the political opposition to the FD was coordinated by a prominent Washington lobbying firm, Barbour, Griffith & Rogers ("BGR"), that had been hired by a citizens' group (Town Action to Save Kent, or TASK) for the purpose of opposing the

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Lieberman, Representatives Johnson, Shays and Simmons, and Connecticut Governor M. Jodi Rell, who urged the committee to "invalidate the *Schaghticoke* decision." *Id.*, 15.

Schaghticoke petition. Monroe Dep., 356:10-17. BGR's Chief Operating Officer, Loren Monroe, admitted that BGR's "representation [of TASK] was broad and focused on Congress, [the] executive branch, working with the governor, the AG, the press." Monroe Dep., 145:7-15. BGR was in contact with "just about every [Connecticut] congressional office." *Id.*, 193:11-13. On at least one occasion, Monroe and a BGR associate, and representatives from TASK, met with Ruben Barrales, the Deputy Assistant to the President and Director of Intergovernmental Affairs, and his staff at the White House.[8] Monroe Dep., 285:15-287:11; 288:6-22; 313:3-5.

In his Ruling on Cross-Motions for Summary Judgment, Judge Dorsey provided a useful summary of the political pressure that was applied in this case:

> There is *no dispute* that the majority of Connecticut's Congressional delegation, the Governor, the Attorney General, and other anti-gaming advocates in Washington *fiercely opposed* the FD's acknowledgment of STN.
>
> * * *
>
> There is *no question* that *throughout 2004 and 2005* the Connecticut Congressional delegation,

[8] In the spring of 2004, Aurene Martin accompanied David Bernhardt (the Department's Director of Congressional and Legislative Affairs) to the White House, where they met with White House personnel, including Margaret Spellings, the Director of Domestic Policy. Decl. of Judith A. Shapiro, ¶ 4 (May 1, 2007). The purpose of the meeting was to brief White House officials on what had occurred with respect to STN's petition. *Id.* Martin believed there were one or two subsequent meetings at the White House, attended by Bernhardt and senior Department officials to discuss the STN petition, but Martin was not invited to those meetings. *Id.*, ¶ 5.

> Connecticut state and local officials, and other public and private stakeholders, including a community organization in the Town of Kent which hired the Washington lobbying firm Barbour Griffith & Rogers (BGR) to advocate on its behalf, *lobbied the Secretary of the Interior, the BIA, the IBIA, the White House, and even this Court about reversing the acknowledgment decision*.
>
> * * *
>
> . . . STN's FD *became the focus* of House and Senate subcommittee hearings attended by DOI staff, members of Congress, AG Blumenthal, and others.
>
> * * *
>
> There is *no question* that *political actors exerted pressure* on the Department *over the course of 2004 and 2005* in opposition to the FD's acknowledgment of STN, both *publicly* through Congressional hearings and media publicity and *privately* through meetings and correspondence with the Secretary and other agency officials.
>
> * * *
>
> There is *no question* that, as discussed above, various members of Congress as well as the Connecticut Governor and AG expressed their disapproval with the STN acknowledgment at the Congressional hearings on the subject, and the hearings became heated on at least one occasion.

(Emphases added.) See Appendix 18a-20a, 25a, 34a, 36a.

Judge Dorsey's summary of political activities would be incomplete without highlighting a few additional events.

A. The Inspector General's Investigation: the Tribe Played by the Rules

In response to a March 12, 2004 request from Senator Dodd, Earl E. Devaney, the Inspector General of the Department of the Interior, conducted a comprehensive six-month investigation. Devaney concluded that neither the BIA nor the Tribe or its representatives had acted improperly in the process leading up to the positive FD. Letter from Earl E. Devaney to Senator Dodd (Aug. 27, 2004). See Appendix 23a, n.7

B. The Attorney General Violates an *Ex Parte* Prohibition

"On March 17, 2004, Connecticut Attorney General Blumenthal and representatives from other states attended a meeting with Secretary of the Interior Gale Norton and members of her staff." Ruling on Motion to Amend Scheduling Order, at 1-2 (Doc. # 75) (June 14, 2004). One of the topics at the meeting was the "possible reform of the tribal recognition process." *Id.*, at 2. After the meeting, Blumenthal had a private discussion with Secretary Norton, during which he expressed his disagreement with the STN FD, and presented her with a letter critical of that decision. As Judge Dorsey noted, the letter "detail[ed] various concerns about the recognition process as it pertained specifically to the Schaghticoke matter, including issues related to the administrative appeal." *Id.*, at 2; The Tribe and other parties subsequently received copies of Blumenthal's letter by mail or facsimile.

Judge Dorsey found that the Attorney General's *ex parte* "presentation" to Norton was "not in compliance with the notice requirement" in the Scheduling Order. *Id.*, at 3. He also stated:

> Second, the *inappropriate nature* of the specific circumstances here at issue demonstrate[s] the necessity of prior notification. *Without any party to this matter being present, Blumenthal affirmatively contacted and met with Secretary Norton, the head of the agency currently hearing an appeal in which Blumenthal has an interest, about the very subject matter of that appeal. Such conduct, at the very least, appears improper and thus threatens to subvert the integrity of the appeal process itself.*

(Emphasis added.) *Id.* In a subsequent Order, Judge Dorsey reiterated that Blumenthal's private communication with Norton had been "improper." Order Re: Pending Motions, at 2 (Doc. # 118 in 3:00-cv-00820 (PCD) (Sept. 30, 2005).

C. A Congressman Threatens the Secretary of the Interior

On March 30, 2004, Secretary Norton was summoned to Capitol Hill to meet with Connecticut Representatives Shays, Johnson, and Simmons. The meeting was held in the office of Representative Frank Wolf of Virginia, a member of the House Appropriations Committee that has fiscal authority over the Department of the Interior. As Norton stated at her deposition, Representative Wolf is "very opposed to gaming." Norton Dep., 163:17-18. The meeting in his office was "fairly emotional," and the Representatives expressed "very strong feelings" and pressed her to overturn the STN FD. Norton Dep., 167:19-22;

168:8-11; 181:7-11. They complained about "the proliferation of casinos in Connecticut," and wanted a moratorium "on tribal recognition" and "gaming approvals." *Id.*, 164:1-15.

Norton testified that during the meeting, Representative Wolf, who was angry, actually threatened her: "Congressman Wolf said *he would tell the President he thought I ought to be fired.*"[9] (Emphasis added.) Norton Dep., 168:12-17; 171:22-173:2; 180:21-181:3; 263:15-264:2.

Norton claimed that she did not take the threat seriously. Norton Dep., 168:20-169:1, 264:10-22, 275:15-276:2. She also testified, however, that David Bernhardt (her Director of Congressional and Legislative Affairs), attended the meeting and heard Wolf's threat; see *id.*, 172:13-15; although, at his own deposition, Bernhardt denied hearing it. Bernhardt Dep., 69:20-70:2-17. Others in the Department certainly learned of the threat, because Norton told her "leadership team" (which included Chief of Staff Brian Waidmann, Aurene Martin, and Deputy Secretary Steven Griles) about it. Norton Dep., 171:22-172:19. Norton did not know if any of those individuals told others, but she never instructed them *not* to discuss it. *Id.*, 171:22-173:5, 275:9-21. Norton considered James Cason to be part of the "leadership group in

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[9] "A Member [of Congress] should **not** directly or indirectly threaten reprisal or promise favoritism or benefit to any administrative official." (Bold in original.) *House Ethics Manual*, Committee on Standards of Official Conduct, U.S. House of Rep., 110th Cong. 2d Session (2008), at 306. "Direct or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representative role." *Id.*, 307. The latter sentence was adopted in 1970. *Id.*, 356-57 (Advisory Opinion No. 1).

the Department that *would have heard* [about it]." (Emphasis added.) *Id.*, 174:15-22, 276:3-9, 282:8-11.

Representative Wolf's threat represents a textbook example of how to "do" political influence. For at the May 5, 2004, hearing of the House Committee on Government Reform, Chairman Tom Davis of Virginia explained: "a lot of times, when you are *doing political influence*, it usually doesn't go to the Deputy Secretary level or sometimes even to the decision-maker. *It goes above them, and the pressure comes down.*" (Emphasis added.) Hearing before the House Committee on Government Reform, *Betting on Transparency: Toward Fairness and Integrity in the Interior Department's Tribal Recognition Process*, 108th Cong., 2d Sess. (2004), at 51.

D. The Schaghticoke Acknowledgment Repeal Bill

On March 3, 2005, Representative Johnson introduced H.R. 1104, the "Schaghticoke Acknowledgment Repeal Act of 2005" (109th Cong., 1st Sess.), for the express purpose of overturning the STN FD. See Appendix 157a-171a. The proposed bill stated that the STN FD was the result, *inter alia*, of the "explicit, *premeditated manipulation* of both the evidence and established acknowledgment standards," and it chastised the OFA and the Principal Deputy AS-IA who issued the FD, of participating in an "erroneous" and "unlawful" decision. *Id.*, at Appendix 159a, 168a-169a. In two places, the bill cites the *full name* of Aurene Martin, the Principal Deputy AS-IA who issued the FD. *Id.*, 160a, 170a.

OFA Director Fleming was provided with a copy of the bill. Fleming Dep., 124:18-125:22. He had not seen a "termination" bill during his career at OFA.

Id., 127:1-14. Although Representative Johnson's bill did not become law, it may have been viewed by OFA (and staff) as a direct threat to OFA's authority.

E. Judge Dorsey's *Ex Parte* Communication with Governor Rell

On July 11, 2005, while the Tribe's petition was under reconsideration by the BIA, Governor Rell wrote to Judge Dorsey, urging him not to allow the Tribe any further extension of time, or any opportunity to submit additional evidence. See Appendix 115a-117a. That letter was made part of the record in the consolidated cases.

On August 19, 2005, Judge Dorsey responded in a *private* letter to the Governor:

> Dear Governor Rell:
>
> Thank you for your letter of July 11, 2005. Your *frustration and impatience is fully warranted*. A court-ordered deadline for concluding the administrative proceeding was intended to accommodate three considerations: 1. the tribe's right to due process; 2. the BIA's caseload; and 3. the lawsuit's parties right to a reasonably prompt resolution of the dispute (including the State's interest). The prolonged protraction of this matter, to resolve the question of tribal recognition, *no. 1 has stretched*, no. 2 has given the BIA more time than it deserves, and no. 3 has deprived the parties of a reasonably prompt resolution.
>
> I have, in accordance with the view of the U.S. Attorney's Office, allowed a slight extension for a request for technical assistance and information. This was *to avoid any claim of infringement of the Tribe's due process*. I recognize this does not

> accommodate no. 3 above nor the view of your letter. It is intended to be a last extension of time upon the expiration of which the cases will be decided. It reflects a caution *intended to avoid a reversal by another Court which might buy a due process argument.*

(Emphasis added.) See Appendix 118a-119a.

Judge Dorsey's letter to the Governor was discovered by the Tribe approximately *one year later*, while reviewing documents received from the Governor's office pursuant to the Tribe's request under the Freedom of Information Act. The Tribe sought "clarification" from Judge Dorsey about his letter, as well as supplemental discovery. Petitioner's Motion for Clarification of the Record and Motion for Supplemental Discovery (Doc. # 87) (Oct. 9, 2006). Judge Dorsey maintained that his letter had "no substantive significance" and did not reflect his views on the merits of STN's claims. Ruling on Pending Motions, at 13-14 (Doc. # 93) (Nov. 3, 2006). At STN's request, the letter was made part of the record, but Judge Dorsey denied supplemental discovery about the letter. *Id.*

In the Court of Appeals, the Tribe contended that the letter was an improper *ex parte* communication with the Governor, an "interested party" under the regulations. See 25 C.F.R. § 83.1. At oral argument, counsel for the Tribe acknowledged that the letter did not furnish independent grounds for relief on appeal. However, the Tribe argued that the letter was emblematic of the political pressures and entanglements that have permeated this case. To repeat what the Tribe said in its Petition for Rehearing *En Banc*:

> The letter displays a sympathetic attitude toward the Governor, and a grudging attitude toward the Tribe's rights. It suggests that three years before he ruled on the Petition for Review, Judge Dorsey was calibrating *how much* due process was needed to "avoid a reversal" *in this Court [of Appeals]*. Logically, such calculation presupposes the Tribe would be unsuccessful in the BIA, and in the District Court, and therefore would *need* to appeal. It is not difficult to see why *any* litigant in a politically charged case, might feel that such a letter contributes to the *appearance* that the "fix was in."

(Emphases in original.) Appendix, at 93a.

III. HOW THE POLITICAL INFLUENCE CLAIM WAS DECIDED

A. In the District Court

In support of its Petition for Review, the STN claimed that the RFD was the impermissible product of political influence, and also claimed that the "appearance of bias" (arising from political influence) constituted grounds for relief. In opposing memoranda, the Federal Defendants and Intervenors-Respondents argued, *inter alia*, that an "appearance of bias" standard was not appropriate for assessing a political influence claim, or was not applicable to an "informal" "regulatory decision making process."

In its Ruling on Cross-Motions for Summary Judgment, the District Court defined the critical question as "whether the evidence presented shows that the [political] pressure exerted can be deemed to have *actually influenced the decision maker who issued the RFD*." (Emphasis added.) See Appendix 34a. Citing

cases from other Circuits, Judge Dorsey stated he was not "persuade[d]" or "convince[d]" that political activities "actually influenced" or "ultimately affected" the decision not to acknowledge the Tribe. *Id.*, 34a-39a. He observed that *he had to* "accept the evidence as presented at face value, in particular the testimony by the agency decisionmakers that they were not unduly pressured by particular politicians or the political climate at large." *Id.*, 38a. Cf. *Latecoere International, Inc. v. United States Department of the Navy*, 19 F.3d 1342, 1365 (11th Cir. 1994 (rejecting proposition that "by the simple expedient of denying bias, a government official can wipe away all evidence of it"); *Sokaogon Chippewa Community (Mole Lake Band of Lake Superior Chippewa) et al. v. Babbitt*, 961 F. Supp. 1276, 1281 (W.D.Wis. 1997) ("Agency officials should not be able to overcome a party's showing of political impropriety by simply denying all allegations of wrongdoing.").[10]

Although Judge Dorsey made brief references to an "appearance" standard; see Appendix 33a; he never analyzed the facts under such a standard.

B. In the Court of Appeals

On appeal, the STN claimed that the Tribe's right to due process of law had been violated by undue political influence which, in the Tribe's view, not only "actually influenced" the ultimate result (the RFD), but also created the "appearance of bias" or impro-

[10] "Bias is always difficult, and indeed often impossible, to 'prove.'" *Morelite Construction Corporation v. New York City District Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2nd Cir. 1984). That, perhaps, is why "[i]ssues of motive and intent are usually inappropriate for disposition on summary judgment. *Wechsler v. Steinberg*, 733 F.2d 1054, 1058 (2nd Cir. 1984).

priety. The Federal Defendants, and the Intervenors-Respondents, argued in response that the panel could not and should not adopt an "appearance of bias" standard, in light of the governing standard adopted by a panel of the Second Circuit in *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2nd Cir. 1984). In *Orangetown*, the court stated: "To support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute." *Id.*, 188. See *Chemung County v. Dole*, 804 F.2d 216, 222 (2nd Cir. 1986) (quoting same).

The panel found that although Connecticut political figures had shown "keen interest" in and "express[ed] an adamant opposition to" the STN acknowledgment, and that members of Congress had "strongly criticized" the STN FD, "the evidence submitted by the Schaghticoke cannot support a claim of improper political influence." Appendix 72a. That conclusion was based principally on the fact that "Interior Department officials uniformly testified in depositions that they were not influenced by the political clamor surrounding the Schaghticoke." *Id.*, at 73a. With respect to the political influence standard, the panel stated, in a footnote: "Our standard for a claim of 'improper political influence' is clear, *see Orangetown*, 740 F.2d at 188; *Chemung County*, 804 F.2d at 222, and we reject the Schaghticoke's argument that we should apply a broader 'appearance of bias' standard in this action." Appendix 73a, n.1.

As noted earlier, the Court of Appeals denied the STN's petition for *en banc* rehearing. See Appendix 111a-112a.

REASONS FOR GRANTING THE WRIT

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process'"; *Caperton v. A.T. Massey Coal Co., Inc.*, __ U.S. __, 129 S.Ct. 2252, 2259 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). "This applies to administrative agencies *which adjudicate* as well as to courts." (Emphasis added.) *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). These two sentences frame the central core of the question presented, and form a bulwark against the political vortex that commandeered this case.

It is true, as Judge Dorsey noted in the opening line of his summary judgment ruling, that the question of whether the Schaghticoke Tribal Nation constitutes an Indian tribe under federal law is a "politically loaded question." See Appendix 1a. But even politically loaded questions are not immune from the protections of the Due Process Clause.

A. The Acknowledgment Process is Adjudicative

With respect to administrative action, the Court has noted the "great range of its variety." *United States v. Mead Corporation*, 533 U.S. 218, 236 (2001). In the District Court, Judge Dorsey correctly noted that "[t]he BIA's federal acknowledgment process is an *adjudicative* process." (Emphasis added.) See Appendix 32a. On appeal, the Federal Defendants argued that the acknowledgment process is merely an "informal adjudicative process" or "informal decisionmaking process," and not suitable for application of a heightened "appearance of bias" standard. Brief of Defendants-Appellees, at 41, 59-62.

The STN argued that even though the tribal acknowledgment process may not constitute a "formal

adjudication" under the APA definition, see 5 U.S.C. § 551 (7), it was sufficiently formal (quasi-judicial) in nature to require adoption of an appearance of bias standard. In support of that proposition, the Tribe argued, for example, that (1) the tribal acknowledgment process qualifies as adjudicative under the "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 244-45 (1973); (2) the applicability of a due process-based "appearance of bias" standard, designed to promote core constitutional values, should turn on the nature or substance of the proceeding in question, not on its label or classification; and (3) "formal adjudication . . . is, by contrast to rulemaking, characteristically long on facts and short on policy. . . ." *Association of Data Processing Service Organizations, Inc. v. Board of Governors of Federal Reserve System*, 745 F.2d 677, 685 n. 6 (D.C.Cir. 1984) (Scalia, J.).

B. The Second Circuit's *Town of Orangetown* Rule

As STN argued in the Court of Appeals, the standard announced in *Town of Orangetown v. Ruckelshaus*, discussed in § III.B., *supra*, was designed and configured for political influence claims arising from *non*-adjudicative federal agency decisions. The agency involved in *Orangetown* "was not performing an adjudicatory function," but only "an administrative one dealing with the disbursement of grant funds." *Town of Orangetown*, *supra*, 740 F.2d at 188. Moreover, "Orangetown did not have the status of a party and was not entitled to notice and an opportu-

nity to be heard." *Id.*, 89. And in *Chemung County v. Dole*, *supra*—the only other Second Circuit decision (prior to this case) applying *Orangetown*—the agency action under review was not adjudicative, as it involved the administrative acts of re-calculating competing bids to insure that a government contract was awarded to the lowest bidder. *Chemung County*, *supra*, 804 F.2d at 218-22. Furthermore, neither of the two cases cited in *Orangetown*, at 188, as authority *for* the rule announced therein, involved adjudicative-type decisions.[11]

In short, *Orangetown* represents a "one size fits all" standard that fails to take into consideration the inherent qualitative differences between quasi-judicial (adjudicative) proceedings and quasi-legislative (rulemaking) proceedings. Such a distinction has been either expressly or implicitly recognized by every other Circuit that has considered a political influence claim, including the First Circuit,[12] the Third Circuit,[13] the Fifth Circuit,[14] the Seventh

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[11] *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) involved informal rulemaking for emissions standards. *Natural Resources Defense Council v. City of New York*, 534 F. Supp. 279 (S.D.N.Y.), aff'd, 672 F.2d 292 (2nd Cir.), cert. dismissed, 456 U.S. 920 (1982), involved review of an enforcement action concerning demolition of a theater.

[12] *Esso Standard Oil Co. (Puerto Rico) v. Lopez-Freytes*, 522 F.3d 136, 145 148 (1st Cir. 2008) (addressing claims of appearance of bias and actual bias).

[13] *Gulf Oil Corporation v. Federal Power Commission*, 563 F.2d 588, 610-12 (3rd Cir. 1977) ("administrative agencies must be allowed to exercise their adjudicative functions free of Congressional pressure"), cert. denied, 434 U.S. 1062 (1978).

[14] *Pillsbury Co. v. Federal Trade Commission*, 354 F.2d 952, 964 (5th Cir. 1966) (when Congress intervenes in an agency's judicial function, courts become concerned not only with liti-

Circuit,[15] the Ninth Circuit,[16] the Eleventh Circuit,[17] and the District of Columbia Circuit.[18] It appears

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gant's right to a fair trial, but "equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences"); *DCP Farms, et al. v. Yeutter*, 957 F.2d 1183, 1187-88 (5th Cir.) ("*Pillsbury* holds that the appearance of bias caused by congressional interference violates the due process rights of parties involved in *judicial* or *quasi-judicial* agency proceedings.") (Emphasis in original.), cert. denied, 506 U.S. 953 (1992).

[15] *Monieson v. Commodity Futures Trading Commission*, 996 F.2d 852, 865 (7th Cir. 1993) (noting distinction between congressional intervention in legislative or judicial functions).

[16] *State of California ex rel. State Water Resources Control Board v. Federal Energy Regulatory Commission*, 966 F.2d 1541, 1551-52 (9th Cir. 1992) (Congressman's letters to FERC "do not rise to the level of undue congressional influence described in *Pillsbury*, nor do they adversely affect *the appearance of impartiality* in this case") (Emphasis added.); *Portland Audubon Society v. The Endangered Species Committee*, 984 F.2d 1534, 1539-47 (9th Cir. 1993) (amended opinion) (even "the President may not interfere with quasi-adjudicatory agency actions").

[17] *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 548 (11th Cir.1996) ("'congressional input neither created *an appearance of impropriety* nor actually affected the outcome'") (Emphasis added) (quoting *ATX, Inc. v. United States Department of Transportation*, 41 F.3d 1522, 1527 (D.C. Cir. 1994)).

[18] *D.C. Federation of Civic Associations et al. v. Volpe*, 459 F.2d 1231, 1246-47 (D.C.Cir. 1971) (if Secretary of Transportation had been acting in judicial or quasi-judicial capacity, "plaintiffs might have prevailed *even without showing that the pressure had actually influenced* the Secretary's decision. With regard to judicial decision making, whether by court or agency, *the appearance of bias or pressure may be no less objectionable than the reality.*") (Emphasis added.), cert. denied, 405 U.S. 1030 (1972); *Peter Kiewit Sons' Co. v. United States Army Corps of Engineers, et al.*, 714 F.2d 163, 169 (D.C.Cir. 1983) ("The [*Volpe*] court indicated that if the decision had been judicial or

that no other Circuit applies an *Orangetown*-type rule "across the board." And prior to the Second Circuit's decision in this case, the *Orangetown* standard (or its equivalent) had never been applied by the Second Circuit, or any other Circuit, to a political influence claim arising from a federal adjudicative proceeding.[19] A grant of certiorari is therefore warranted to resolve the conflict between the Circuits. See Rule 10(a), Rules of the Supreme Court.

There is nothing novel or unusual about an "appearance of bias" or "appearance of impropriety" standard. Indeed, a cardinal principle of American jurisprudence is that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986). See *Joint Anti-Fascist*

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quasi-judicial, it could be invalidated by 'the appearance of bias or pressure.' Under this standard, pressure on the decision-maker alone, without proof of effect on the outcome, is sufficient to vacate a decision."); *ATX, Inc. v. United States Department of Transportation*, 41 F.3d 1522, 1527-29 (D.C. Cir. 1994) (where a proceeding is quasi-judicial, "we must determine whether congressional interference occurred, *or appeared to*, to such an extent as to compromise the administrative process") (Emphasis added.); *Koniag, Inc., The Village of Uyak v. Andrus*, 580 F.2d 601, 610 (D.C. Cir.) (Congressional letter to Interior Secretary "compromised *the appearance of the Secretary's impartiality*") (Emphasis added.), cert. denied, 439 U.S. 1052 (1978). See also *Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority*, 672 F.2d 109, 113 (D.C.Cir. 1982) (*ex parte* contacts).

[19] *Orangetown* was cited by the Sixth Circuit in an administrative *rulemaking* (non-adjudicative) case. See *Radio Association on Defending Airwave Rights, Inc. v. United States Department of Transportation*, 47 F.3d 794, 807 (6th Cir), cert. denied, 516 U.S. 811 (1995).

Refugee Committee v. McGrath, 341 U.S. 123, 172 n. 19 (1951) (Frankfurter, J., concurring) ("'justice must not only be done but manifestly be seen to be done'").

With respect to judicial officers, the Court's recent *Caperton* decision noted that state and federal jurisdictions have adopted measures designed "to eliminate even the *appearance* of partiality." 129 S.Ct. at 2266 (Emphasis added.) (citing the ABA Annotated Model Code of Judicial Conduct, Canon 2 ("A judge shall avoid impropriety and the appearance of impropriety."). Under state and federal codes, judges are required to disqualify themselves where the judge's "impartiality might reasonably be questioned." See *id.*, Canon 3E(1); 28 U.S.C. § 455(a). Thus, even absent proof of *actual bias*, due process may be violated when there is a serious or substantial "risk of actual bias"; *Caperton*, *supra*, 2265; or "when the probability of actual bias on the part of the judge or *decisionmaker* is too high to be constitutionally tolerable." (Emphasis added.) *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Caperton*, *supra*, 2257, 2259.

Although this case does not involve the issue of recusal, it does involve the issue of whether a "decisionmaker" *appeared* to be biased or partial as a result of extensive political pressure—the kind of pressure that can lead even a well-intentioned decisionmaker "not to hold the balance nice, clear and true." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Caperton*, *supra*, 2265 (quoting same). The principles that animate *Caperton* are equally applicable to an administrative *adjudicative* decisionmaker.

In the universe of reported cases involving claims of "political influence" on administrative proceedings, this case is, by any measure, "extreme," considering the breadth and intensity of the pressures exerted on

a federal agency. While "extreme cases often test the bounds of established legal principles," "it is also true that extreme cases are more likely to cross constitutional limits, requiring the Court's intervention and formulation of objective standards." *Caperton*, *supra*, 2265. This case presents an exceptional opportunity for the Court to consider the important constitutional question presented.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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May 24, 2010

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Case No. 3:06-cv-00081 (PCD)

SCHAGHTICOKE TRIBAL NATION,
Petitioner,

v.

DIRK KEMPTHORNE, Secretary,
Department of the Interior, *et al.*,
Respondents,

STATE OF CONNECTICUT, KENT SCHOOL CORPORATION, THE CONNECTICUT LIGHT AND POWER COMPANY, and TOWN OF KENT,
Intervenors-Respondents.

August 22, 2008, Decided
August 26, 2008, Filed

JUDGES: Peter C. Dorsey, *U.S. District Judge*.

OPINION BY: Peter C. Dorsey

OPINION

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case concerns the politically loaded question of whether the Schaghticoke Tribal Nation ("STN" or "Petitioner") constitutes an Indian tribe within the meaning of federal law as provided in the federal acknowledgment regulations, 25 C.F.R. Part 83. (1994). On October 11, 2005, Associate Deputy Sec-

retary of the Interior James E. Cason issued a Reconsidered Final Determination (the "RFD") concluding that the STN did not meet the federal acknowledgment requirements. On January 12, 2006, STN filed a petition for review in this Court claiming that the Department of the Interior's RFD was arbitrary and capricious under the Administrative Procedure Act (APA), the result of improper political influence in violation of STN's due process rights, and the product of an ultra vires decision in violation of the Appointments Clause of the United States Constitution and of the Vacancies Reform Act. After conducting extra-record discovery upon permission from the Court, Petitioner filed a motion for summary judgment. Respondents Dirk Kempthorne, Secretary of the Interior; James Cason, Associate Deputy Secretary of the Interior; the United States Department of the Interior (the "Department" or "DOI"); the Bureau of Indian Affairs ("BIA"); the Office of Federal Acknowledgment ("OFA"); and the Interior Board of Indian Appeals ("IBIA") (collectively, the "Federal Respondents") filed a cross-motion for summary judgment. Intervenors the State of Connecticut, Kent School Corporation, The Connecticut Light and Power Company, and the Town of Kent (collectively the "Intervenors" or "Intervenor-Respondents"), who participated as interested parties in the administrative proceedings before the DOI, also filed a cross-motion for summary judgment.[1]

[1] Kent School Corporation, The Connecticut Light and Power Company, and the Town of Kent are defendants and the State is an *amicus* in two land claim suits brought by STN under the Non-Intercourse Act, *Schaghticoke Tribal Nation v. Kent Sch. Corp., et al.*, No. 3:98-cv-01113 (PCD), and *Schaghticoke Tribal Nation v. Schaghticoke Indian Tribe, et al.*, No. 3:00-cv-00820 (PCD). These cases were consolidated with the lead case, *United*

Because the Court is able to resolve the pending motions on the papers, Petitioner's request for oral argument is denied. For the reasons stated below, Petitioner's Motion for Summary Judgment [Doc. No. 165] is denied, and Respondents' Cross-Motion for Summary Judgment [Doc. No. 178] and the Intervenor-Respondents' Cross-Motion for Summary Judgment [Doc. No. 174] are granted. Respondents' Motion to Strike [Doc. No. 182] is granted in part and denied in part.

I. MOTION TO STRIKE

Before delving into the merits of the case, the Court must resolve the scope of the record before it. The Respondents and Intervenor-Respondents have moved pursuant to Rule 56(e) to strike 19 documents submitted by Petitioner in support of its motion for summary judgment.[2] Rule 56(e) provides that on a summary judgment motion, "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e); *see also* Local R.

States v. 43.47 Acres Of Land, et al., No. 2:85-cv-01078 (PCD), filed on December 16, 1985, in which the United States seeks to condemn certain lands adjacent to the Schaghticoke state reservation for the Appalachian Trail. All three land claim suits involve the question of whether the STN is an Indian tribe under federal law.

[2] Respondents also move to strike the two exhibits attached to Petitioner's memorandum in support of its motion, a time line and a graphic created by Petitioner to assist the Court in understanding the facts of the case. The Court will treat the exhibits as part of Petitioner's memorandum, an argument to consider but to accept as undisputable only to the extent it is supported by evidence in the record.

56(a)(3). "The principles governing admissibility of evidence do not change on a motion for summary judgment. . . . Therefore, only admissible evidence need be considered by the trial court in ruling on a motion for summary judgment." *Merry Charters, LLC v. Town of Stonington*, 342 F. Supp. 2d 69, 75 (D. Conn. 2004) (quoting *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997)). "A motion to strike is the correct vehicle to challenge materials submitted in connection with a summary judgment motion." *Newport Elecs., Inc. v. Newport Corp.*, 157 F. Supp. 2d 202, 208 (D. Conn. 2001). "[A] motion to strike is appropriate if documents submitted in support of a motion for summary judgment contain inadmissible hearsay or conclusory statements, are incomplete, or have not been properly authenticated." *Spector v. Experian Info. Servs. Inc.*, 321 F. Supp. 2d 348, 352 (D. Conn. 2004) (citations omitted); *see also Hollander v. Am. Cyanamid Co.*, 999 F. Supp. 252, 255-56 (D. Conn. 1998). For the reasons that follow, Respondents' motion to strike is granted in part and denied in part.

The Respondents first move to strike all of the contested documents on the basis that they are outside the administrative record. When reviewing an agency decision pursuant to the Administrative Procedure Act, a court is generally confined to the administrative record compiled by the agency when it made its decision. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971). However, in some circumstances, as in this case, parties are permitted to conduct discovery beyond the administrative record. *See Schaghticoke Tribal Nation v. Norton*, No. 3:06-cv-0081 (PCD), 2007 U.S. Dist. LEXIS 19535, 2007 WL 867987, at *5 (D. Conn. March 19, 2007) (citing

Sokaogon Chippewa Comm'y (Mole Lake Band of Lake Superior) v. Babbitt, 961 F. Supp. 1276, 1281 (W.D. Wis. 1997)). Evidence now presented by Petitioner outside the administrative record but pursuant to this Court's prior discovery rulings may be considered to the extent it satisfies the evidentiary admissibility rules, *see Sokaogon*, 961 F. Supp. at 1283, especially since Respondents themselves have relied on evidence uncovered through discovery and outside the administrative record. *See id.* at 1286.

Respondents' motion to strike the declarations of Judith A. Shapiro, Aurene Michelle Martin, William J. Gullotta, and Steven L. Austin is denied. Even if a declaration would not be admissible at trial, a court may consider it on a summary judgment motion if it is based on personal knowledge and sets forth facts to which the declarant could testify at trial and that would be admissible in evidence. Fed. R. Civ. P. 56(e). The declarations challenged by Respondents' motion to strike are all based on personal knowledge and are therefore appropriate for review at this time. Respondents argue that Shapiro's declaration contains information relayed by former Department official Aurene Martin which constitutes inadmissible hearsay. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. (801)(c). However, under Rule 801(d)(2)(D) of the Federal Rules of Evidence, an out-of-court statement is not hearsay if it is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(D). The statements by Ms. Martin captured in Attorney Shapiro's declarations were made regarding her employment as

Principal Deputy Assistant for Indian Affairs regarding the STN acknowledgment decision, unquestionably matters within the scope of her employment at the Department of the Interior, a party to this case. These statements are therefore admissible as party admissions, even though Ms. Martin was no longer employed as the Principal Deputy Assistant in 2007 when she made these statements to Attorney Shapiro. *See Limone v. United States*, 497 F. Supp. 2d 143, 163 n. 31 (D. Mass. 2007) (finding testimony of currently unavailable FBI agents before House Committee on Government Reform admissible as party admissions over government's hearsay objection, even though at time of testimony agents were no longer employed by government); *see also In re Jacoby Airplane Crash Litigation*, No. 99-6073 (HAA), 2007 U.S. Dist. LEXIS 69291, 2007 WL 2746833, at *4-5 (D.N.J. Sept. 19, 2007) (collecting cases where out-of-court statements by government employees were admissible against the government).

Despite the assertion in their reply to the contrary, Respondents merely cite a list of contested documents in their motion to strike, failing to specify what about any of the documents renders them inadmissible. Respondents assert that many of the contested documents are inadmissible because they are unauthenticated documents. However, the news and magazine articles submitted by Petitioner (Pet'r's Exs. 17, 79) are self-authenticating under Rule 902(6) of the Federal Rules of Evidence and are therefore admissible. Petitioner's Exhibit 31, the press release issued by Representative Christopher Shays on March 12, 2004, may also be considered self-authenticating. Press releases by government authorities may be self-authenticating under Rule 902(5) as official publications issued by a public authority.

Although nothing on the page of the exhibit submitted by Petitioner demonstrates that it was an official document issued by Representative Shays' office, *see Sannes v. Jeff Wyler Chevrolet, Inc.*, No. C-1-97-930, 1999 U.S. Dist. LEXIS 21748, 1999 WL 33313134, at *3 n.3 (S.D. Ohio March 31, 1999) (holding that Federal Trade Commission press releases "printed from the FTC's government world wide web page[] are self-authenticating official publications under Rule 902(5)."), STN included the web address for Representative Shays' press releases in its Local Rule 56(a)(1) statement, thereby allowing the Court to verify that the press release in the record was a copy of an official document issued by a public authority. *See* 2 McCormick On Evid. § 227 (6th ed. 2006) (noting that information "retrieved from government websites . . . has been treated as self-authenticating, subject only to proof that the webpage does exist at the governmental web location.").

Respondents also move to strike numerous emails sent to and from the lobbying firm Barbour Griffith & Rogers ("BGR") for lack of authentication and as inadmissible hearsay. However, these emails have been properly authenticated to the extent that they were produced to Petitioner by BGR itself during discovery. *See John Paul Mitchell Sys. v. Quality King Distribs., Inc.*, 106 F. Supp. 2d 462, 472 (S.D.N.Y. 2000) (holding that the act of production itself implicitly authenticates documents). They also were identified at Loren Monroe's deposition. *See* Fed. R. Evid. § 901(b) (providing that "[t]estimony that a matter is what it claimed to be" is an example of identification which satisfies the authentication requirement of Rule 901(a)).

A more significant problem with the BGR emails is that they contain hearsay. Petitioner argues that the BGR emails constitute business records and are therefore admissible under the business-records hearsay exception of Rule 803(6). However, "a party seeking to introduce an email made by an employee about a business matter under the hearsay exception under Rule 803(6) must show that the employer imposed a business duty to make and maintain such a record." *Canatxx Gas Storage Ltd. v. Silverhawk Capital Partners, LLC*, Civ. No. H-06-11330, 2008 U.S. Dist. LEXIS 37803, 2008 WL 1999234, at *12 (S.D. Tex. May 8, 2008); *see also DirecTV, Inc. v. Murray*, 307 F. Supp. 2d 764, 772-73 (D.S.C. 2004) (admitting sales records contained in emails under the business records hearsay exception when the sale orders were regularly received by email and the emails were retained as records of each order). Because Petitioner has submitted absolutely no information regarding the practice or composition of the emails at issue, the Court will not deem them admissible as business records. *New York v. Microsoft*, No. CIV A. 98-1233 (CKK), 2002 U.S. Dist. LEXIS 7683, 2002 WL 649951, at *2 (D.D.C. April 12, 2002).

Petitioner also argues that the emails are offered not to prove the truth of the matters asserted within them but as circumstantial evidence of Mr. Monroe's and other writers' and recipients' states of mind. *See* Fed. R. Evid. 803(3); *United States v. Dupre*, 462 F.3d 131, 137 (2d Cir. 2002). However, as cited by Petitioner in its briefs, the emails are offered not to reflect anyone's state of mind but to prove that certain meetings and hearings happened and that certain lobbying strategies were employed. To the extent that these emails constitute a record of corres-

pondence between Department officials, legislative staffers, members of TASK, and employees of BGR about the opposition to STN's acknowledgment, the Court recognizes the existence of this paper trail as a part of the admissible record. The truth of the content of the emails written by BGR and by Congressional aides, however, are inadmissible hearsay and will therefore not be considered. Because BGR was hired by a community organization and was not acting in this instance as an agent of the state or federal government, communications from BGR cannot be considered party admissions which fall within a hearsay exception. The Court will also strike emails written by the co-founders of TASK, which is not a party to this action and which was not acting as an agent of the state. Similarly, because no members of Congress or their aides are parties to this case, the emails written by Congressional staffers are not party admissions either. Emails written from staff members of Governor Rell's office and by employees of the Department, however, will be considered admissions of party-opponents excludable from the definition of hearsay under Rule 801(d)(2)(D) and will therefore remain in the record.

For these reasons, Respondents' Motion to Strike is granted in part. Exhibits 7, 18, 24, 28, 36, 39, 40, and 53, and portions of Exhibits 22, 38, 69, 38 to the Petitioner's motion for summary judgment will be stricken from the record.

II. MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.

R. Civ. P. 56(c). No genuine issue of material fact exists and summary judgment is therefore appropriate when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). A material fact is one which "might affect the outcome of the suit under the governing law," and an issue is genuine when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Importantly, however, "[c]onclusory allegations will not suffice to create a genuine issue." *Delaware & H.R. Co. v. Conrail*, 902 F.2d 174, 178 (2d Cir. 1990). The moving party bears the burden of establishing that summary judgment is appropriate. *Anderson*, 477 U.S. at 225, 106 S. Ct. 2505. "A defendant need not prove a negative when it moves for summary judgment on an issue that the plaintiff must prove at trial. It need only point to an absence of proof on the plaintiff's part, and, at that point, plaintiff must 'designate specific facts showing that there is a genuine issue for trial.'" *Parker v. Sony Pictures Entm't, Inc.*, 260 F.3d 100, 111 (2d Cir. 2001) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)); *see also Gallo v. Prudential Residential Servs. Ltd. P'ship*, 22 F.3d 1219, 1223-24 (2d Cir. 1994) ("The moving party may obtain summary judgment by showing that little or no evidence may be found in support of the non-moving party's case."). The same legal standards apply when considering cross-motions for summary judgment. A court "must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party

whose motion is under consideration." *Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 142 (2d Cir. 2004) (citations omitted); *see also Scholastic, Inc. v. Harris*, 259 F.3d 73, 81 (2d Cir. 2001). A court must deny both parties' motions for summary judgment if it finds the existence of disputed material facts. *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001). Therefore, "each party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration." *Id.* at 121.

A challenge to a final agency action such as this one is brought pursuant to the APA, 5 U.S.C. §§ 701 *et seq.*, under which judicial review is not *de novo review*. Recognizing that administrative agencies are more knowledgeable than the courts in many specialized areas of fact determinations, the APA requires courts to exercise considerable deference when reviewing agency decisions. *Nat'l Res. Def. Council v. SEC*, 196 U.S. App. D.C. 124, 606 F.2d 1031, 1048 (D.C. Cir. 1979); *State of New York Dep't of Soc. Servs. v. Shalala*, 21 F.3d 485, 492 (2d Cir. 1994) (standard of review is deferential, presuming validity of agency actions as long as the decision has a "rational basis").

A court may overturn an agency decision only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (E). An agency decision is arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency,

or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Vt. Pub. Research Group v. U.S. Fish & Wildlife Serv.*, 247 F. Supp. 2d 495, 505 (D. Vt. 2002) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)); *see also Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 498 (2d Cir. 2005). The court looks for consideration of relevant data, a satisfactory explanation of the decision, and a rational connection between the facts the agency found and the decision it made. *Miami Nation of Indians of Indiana v. Babbitt*, 112 F. Supp. 2d 742, 751 (N.D. Ind. 2000), aff'd, 255 F.3d 342 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129, 122 S. Ct. 1067, 151 L. Ed. 2d 970 (2002) (citing *State Farm*, 463 U.S. at 43, 103 S. Ct. 2856). "The task of the reviewing court under this standard is to determine whether the agency has considered the pertinent evidence, examined the relevant factors, and articulated a satisfactory explanation for its action including whether there is a rational connection between the facts found and the choice made." *J. Andrew Lange, Inc. v. FAA*, 208 F.3d 389, 391 (2d Cir. 2000) (internal questions omitted). The objective of the court's inquiry is "whether there has been a clear error of judgment." *Citizens to Preserve Overton Park*, 401 U.S. at 416, 91 S. Ct. 814.

B. Background

1. Federal Acknowledgment Regulations

The BIA has established policies and procedures for acknowledging that certain American Indian groups exist as tribes. Federal acknowledgment of tribal existence by the DOI is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of

their status as tribes. 25 C.F.R. § 83.2. Acknowledgment also establishes a government-to-government relationship with the United States and entitles a tribe to the immunities and privileges available to other federally acknowledged Indian tribes. *Id. See also Cherokee Nation v. Georgia*, 30 U.S. 1, 17, 5 Pet. 1, 8 L. Ed. 25 (1831). The acknowledgment regulations apply to "those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian tribes by the Department" and are "intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present." *Id.* § 83.3. Because a tribe is a political, not a racial, classification, *Morton v. Mancari*, 417 U.S. 535, 553, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974), the essential requirement for acknowledgment is continuity of tribal existence. 59 Fed. Reg. 9280, 9282 (Feb. 25, 1994).

The acknowledgment regulations contain seven criteria, each of which must be satisfied by the petitioner: (a) identification as an American Indian entity on a substantially continuous basis since 1900; (b) existence as a distinct community from historical times to the present; (c) existence of political influence or authority from historical times to the present; (d) a governing document including membership criteria; (e) membership is composed of individuals who descend from a historical Indian tribe; (f) membership is composed of persons who are not members of an acknowledged tribe; and (g) the petitioner's prior tribal status was not terminated by Congress. 25 C.F.R. § 83.7. A petition must be denied if the available evidence "demonstrates that it does not meet one or more of the criteria," or if there is "in-

sufficient evidence that it meets one or more of the criteria." *Id.* § 83.6(d). Although conclusive proof is not required, the available evidence must establish "a reasonable likelihood of the validity of the facts relating to that criterion." *Id.* The burden of proof rests on the petitioner. *Id.* § 83.6(c).

At issue in this case are STN's ability to satisfy the criteria established by Sections 83.7(b) and (c) of the acknowledgment regulations, showing that a tribal group has maintained community and bilateral political relations on a substantially continuous basis from historical times to the present. Section 83.7(b) requires proof that "a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present." 25 C.F.R. § 83.7(b). Community means "any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers. *Id.* § 83.1. The regulations provide examples of how a group may demonstrate community at a particular time through a combination of "direct" evidence, such as "significant rates of marriage within the group," "significant social relationships connecting individual members," and "significant rates of informal social interaction which exist broadly among the members of the group." *Id.* § 83.7(b)(1)(i)-(ix). Alternatively, a group may demonstrate community at a particular time if it can show that more than 50% of its members reside in a geographical area exclusively or almost exclusively composed of members of the group, and the rest of the group consistently interacts with it, or, if at least 50% of the members speak a distinct language. Community can also be demonstrated for a time period if

at least 50% of the marriages in the group are between members. *Id.* § 83.7(b)(2)(i)-(v).

Section 83.7(c) requires proof that the petitioner has "maintained political influence or authority over its members as an autonomous entity from historical times until the present." 25 C.F.R. § 83.7(c). "Political influence or authority" is defined as:

> a tribal council, leadership, internal process or some other mechanism which the group has used as a means of influencing or controlling the behavior of its members in significant respects, and/or making decisions for the group which substantially affect its members, and/or representing the group in dealing with outsiders in matters of consequence.

Id. § 83.1. Political influence or authority is a bilateral relationship between the members and their leaders. Miami Nation of Indians, 112 F. Supp. 2d at 756. A group may demonstrate political influence or authority over its members at a particular time by providing a combination of evidence, for example, that it could mobilize significant numbers of members and resources from its members for group purposes, that members consider actions taken by leaders to be important, or that there is widespread knowledge and involvement in political processes by most of the members. 25 C.F.R. § 83.7(c)(1)(i) (iii). Sufficient evidence for political authority at a particular time would be if the group allocates group resources, such as land, on a consistent basis, or settles disputes among members on a regular basis. *Id.* § 83.7(c)(2)(i)-(ii). Petitioner must demonstrate both community and political authority on a "substantially continuous basis." *Id.* § 83.6(e).

2. The Proposed Finding and Final Determination of STN's Petition

The Reconsidered Final Determination issued in October 2005 that the STN was not an Indian tribe within the meaning of federal law as provided by the federal acknowledgment regulations was the culmination of an extensive administrative process that included a Proposed Finding ("PF"), a petitioner and public comment period on the PF, a petitioner's response to the comments, and a Final Determination ("FD"). In response to requests for reconsideration filed by various interested parties, the Interior Board of Indian Appeals ("IBIA") reviewed the FD. Following the review of response briefs by STN, the IBIA vacated and remanded the FD to the Department of the Interior. STN and other interested parties provided further comments to the agency after the remand, and in October 2005 the Department issued its final and effective agency decision, the RFD.[3]

The Proposed Finding ("PF"), or preliminary acknowledgment decision, on the STN, issued pursuant to 25 C.F.R. § 83.10(h), analyzed and evaluated all of the evidence then in the record in the context of the acknowledgment regulations. Notice of the PF, which was issued on December 5, 2002, was published in the Federal Register, 67 Fed. Reg. 76184 (Dec. 11, 2004). (Resp'ts' Ex. C.) The PF concluded that STN

[3] STN submitted the RFD as Exhibit 1 to its motion for summary judgment, the FD as Exhibit 4, and the IBIA's decision *In re Federal Acknowledgment of the Schaghticoke Tribal Nation*, 41 IBIA 30 (May 12, 2005), as Exhibit 112. The Intervenor-Respondents have attached the PF as Exhibit A to their cross-motion. Citations in this Ruling will refer directly to the documents themselves.

had not provided sufficient evidence that it (1) was continuously a community or (2) exercised political influence over its members throughout history. The PF also raised a problem with regards to STN's current membership, which excluded individuals who had been ousted from or refused to be part of STN. STN provided sufficient evidence to satisfy the other criteria. A roughly 8-month comment period followed publication of the PF and its record, during which professional staff from the Office of Federal Acknowledgment ("OFA"), provided technical assistance to the parties. (*See* FD at 4.) Extensive comments were received on the PF, and STN was afforded the opportunity to reply to the third-party comments.

Following an evaluation of all of the evidence in the record, the OFA professional staff determined that STN did not meet all criteria in the regulations because it did not provide sufficient evidence of community and political authority for significant periods of time. The OFA posed two questions to the Principal Deputy Assistant Secretary--Indian Affairs in a briefing paper dated January 12, 2004:

> (1) Should the petitioner be acknowledged even though evidence of political influence and authority is absent or insufficient for two substantial historical periods, and if so, on what grounds? and
>
> (2) Should the STN be acknowledged (subject to decision on Issue 1) even though a substantial and important part of its present-day social and political community are not on the current membership list because of political conflicts within the group?

(STN's Ex. 69 at 4.)

On January 29, 2004, Principal Deputy Assistant Secretary—Indian Affairs Aurene Martin, as acting Assistant Secretary, issued the Final Determination, notice of which was published in the Federal Register on February 5, 2004. 69 Fed. Reg. 5570. The FD answered both of OFA's questions in the affirmative and concluded that STN had met all seven federal acknowledgment criteria. The FD concluded that notwithstanding the insufficient evidence to establish community criterion 83.7(b) or political influence criterion 83.7(c), the continuous historic state recognition of the Schaghticoke, combined with a state-maintained reservation dating to colonial times, could be considered evidence to meet these two criteria. (FD at 14.) Even without direct evidence in certain time periods to meet the specific criteria, the FD used state recognition as "evidence bearing on continuity of the group's existence." (*Id.*) The FD also concluded that since the certified membership list and the second list of unenrolled individuals reflected the "actual" political community, and since the Assistant Secretary—Indian Affairs did not have the authority to acknowledge only part of a group, the two lists should be combined to define the acknowledgeable group. (*Id.* at 56, 58.) In conclusion, the FD determined that STN merited federal acknowledgment.

3. Political Response to the FD

What followed the FD in the so-called backrooms of Washington is the subject of much concern to STN, one of whose central claims in this case is that the ultimate RFD was the product of undue influence exerted by state and congressional political forces. There is no dispute that the majority of Connecticut's Congressional delegation, the Governor, the Attorney

General, and other anti-gaming advocates in Washington[4] fiercely opposed the FD's acknowledgment of STN. It was public knowledge that state and local interests urged the Department to reverse its acknowledgment decision. Representative Shays summed up his position in a press release issued after the FD was announced:

> It is extremely disappointing the Bureau of Indian Affairs recognized the Schaghticokes as a federal tribe. Because the state tribe only recently re-established family connections which ceased generations ago, it seemed clear they did not meet the BIA criteria of continuity from pre-colonial times. This recognition may enable the Schaghticokes to build a casino, which I believe will be very detrimental to the state. We have to respect the process, but I hope the state

[4] STN's petition before the DOI only concerns federal acknowledgment of the Schaghticoke tribal group as a sovereign Indian nation, and, insofar as has been presented to this Court, include no mention of casino development or other Indian gaming enterprises. However, the cultural climate of the last dozen years has created a tendency to equate tribal acknowledgment with casino development. See, e.g., Oversight Hearing on the Fed. Recognition of Indian tribes: Hearing Before the Sen. Comm. on Indian Affairs, 109th Cong., S. Hrg. 109-91 (May 11, 2005), at 10 (Representative Christopher Shays: "The bottom line for me is the recognition process is corrupt and has been for years. Regretfully, Indian recognition is too often not about recognizing true Indian tribes, but it is about Indian gaming and the license to print money.") STN notes that it first petitioned for acknowledgment in 1981, long before the gaming regulations allowed casinos to be operated on Indian lands. Common sense indicates, however, that much of the political brouhaha and community opposition to STN's economic acknowledgment petition stems from concerns, whether, social, or moral, about additional casino development in Connecticut, which is already home to two very large Indian casinos.

> uses all the resources necessary to seek to overturn the decision. I will continue to work with Attorney General Dick Blumenthal to assist him in any way I can with this process.

(Pet'r's Ex. 8, Press Release, Christopher Shays, Statement on BIA Decision to Recognize Schaghticokes (Jan. 29, 2004), available at, http://www.house.gov/shays/news/2004/january/janbia.htm (last checked Aug. 19, 2008); *see also* Pet'r's Ex. 14, Press Release, Attorney General Blumenthal, Attorney General Asks for Moratorium on Tribal Recognitions During DC Meeting with Interior Secretary (March 17, 2004); Pet'r's Ex. 15, Press Release, Attorney General Blumenthal, Attorney General Calls for Immediate Reversal of Schaghticoke Recognition Because of BIA Error (Dec. 8, 2004); Fleming Dep. 183:12-184:1 (admitting that when it came to criticism by public officials, members of Congress, and top state political officials, "this case is—is one of the top.").) There is no question that throughout 2004 and 2005 the Connecticut Congressional delegation, Connecticut state and local officials, and other public and private stakeholders, including a community organization in the Town of Kent which hired the Washington lobbying firm Barbour Griffith & Rogers (BGR) to advocate on its behalf, lobbied the Secretary of the Interior, the BIA, the IBIA, the White House, and even this Court about reversing the acknowledgment decision.[5] (*See, e.g.*, Letter from Ruben Barrales,

[5] The Federal Respondents dispute the characterization of any relevant activities as "lobbying." Although "lobbying" has acquired a negative connotation in recent years—in particular when mention in relation to Indian affairs during this period, when the government was wracked by scandals perpetrated by lobbyists to Indian gaming interests—its simple definition is "to attempt to influence or sway (as a public official) toward a

Deputy Assistant to the President of the United States and Director of Intergovernmental Affairs, to Connecticut Governor Jodie Rell (March 2, 2005); Letter from Richard Blumenthal, Connecticut Attorney General, to Alberto Gonzales, Assistant to the President and White House Counsel (Dec. 15, 2004); Norton Dep. 181:7-11; Letter from Reps. Johnson, Shays, and Simmons to the Hon. Steven K. Linscheid, Chief Administrative Law Judge, IBIA (Feb. 10, 2005); Email from Jackie Cheek to Lee Fleming, Aurene Martin, Theresa Rosier, George Skibine, et al. (July 19, 2004); Email from Lee Fleming to George Skibine, Aurene Martin, Jackie Cheek, Theresa Rosier, et al. (July 20, 2004); Letter from Governor Rell to the Hon. Peter C. Dorsey, U.S. District Court for the District of Connecticut (July 11, 2005); Letter from the Hon. Peter C. Dorsey to Governor Rell (Aug. 19, 2005).) The open question in this matter is whether this lobbying exerted improper pressure on agency officials and amounted to undue political influence on the agency process.

In early March 2004, members of the Connecticut Congressional Delegation sent multiple letters to Gale Norton, who was at that time Secretary of the Interior, expressing concern that the FD was not based on the agency's regulations or existing precedent and urging her "to take personal action and investigate what appears to be yet another instance of a flawed tribal recognition process." (Pet'r's Ex. 44, Letter from Conn. Congressional Delegation to Gale

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desired action," Merriam Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/lobby (retrieved Aug. 19, 2008), which aptly describes the undisputed interactions between various political actors and agency officials documented in the record in this case.

Norton (March 16, 2004).) On March 30, 2004, Secretary Norton had a meeting on Capitol Hill with Representative Frank Wolf of Virginia[b] and Representatives Nancy Johnson, Christopher Shays, and Rob Simmons of the Connecticut delegation. Secretary Norton testified in her deposition that the tenor of her first meeting with the Congressional delegation was "fairly emotional." (*See* Norton Dep. 167: 9-12.) When asked whether she agreed that Representative Wolf and the Connecticut delegation were "pressing" her to overturn the FD, Secretary Norton replied: "That was the outcome they wanted." (*Id.* at 181:7-11.) Representative Wolf threatened to tell the President that Secretary Norton should be fired, apparently in response to her general handling of the BIA (and not specifically in connection with her failure to reverse the STN decision, as Petitioner suggests). (*Id.* at 168:15-17.) However, Norton testified at her deposition that she does not "recall exactly what I said in response to that comment, but I did not lose any sleep over that threat." (*Id.* at 168:21-169:1.) She also testified with respect to Representative Wolf's threat, "I did not anticipate that anything would come of that threat even if he did follow through and call the White House. And in fact, nothing did come from that." (*Id.* at 264:10-265:6.) Furthermore, when asked "what impact did your communications with the Connecticut Congressional Delegation have in reaching the Reconsidered Final Determination on the STN," she responded:

[b] Representative Wolf was a member of the House Appropriations Committee, which holds fiscal jurisdiction over the Department of the Interior, and a vocal opponent of Indian gaming. (See Norton Dep. 163:13-18.)

> [M]uch of what they raised was irrelevant. The questions that are appropriate are those that really go to whether evidence has been submitted that meets the criteria. They did have an effect in asking me to have the Inspector General give high priority to the investigation that they had requested to make sure that the process was being handled in a valid way. I don't believe that their input had any effect on the substantive outcome of the Determination.

(*Id.* at 261:4-22.)[7] Secretary Norton did, however, tell others in the Department, including her senior leadership team, about the March 30th meeting and Representative Wolf's threat. (*Id.* at 171:4-12, 172:7-19.) On April 1, 2004, Secretary Norton had a second meeting on Capitol Hill with Representatives Shays and Johnson, also joined by Senators Joseph Lieberman and Christopher Dodd and Representative Rosa DeLauro. Secretary Norton was accompanied by her congressional liaison David Bernhardt. (Norton Dep. 175:20-176:9.)

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[7] AG Blumenthal, Senator Christopher Dodd, and others requested an Inspector General's investigation into whether any source of undue influence had affected the FD. (See, e.g., Pet'r's Ex. 25, Letter from Earl E. Devaney, Inspector General, to Senator Dodd (Aug. 27, 2004).) The Inspector General conducted an investigation but found no evidence to support the allegation that lobbyists or representatives of STN directly or indirectly influenced BIA officials to grant STN federal recognition. "Although the STN recognition decision was highly controversial, we found that OFA and the Principal Duty Assistant Secretary—Indian Affairs conducted themselves in keeping with the requirements of the administrative process, their decision-making process was made transparent by the administrative record, and those parties aggrieved by the decision have sought relief in the appropriate administrative forum—each as it should be." (*Id.* at 3-4.)

In July 2004, Representative Johnson contacted the BIA to request a meeting with agency officials, including Principal Deputy AS-IA Martin, in order to deliver to the BIA 8,000 survey postcards from her constituents stating that they opposed opening additional casinos in Connecticut. In an email to staff, OFA Director Lee Fleming described the survey postcards as a "PR ploy":

> Part of the purpose of the administrative procedures is to remove the influence of political pressures from the acknowledgment process. Opposition by state and local governments . . . is not taken into account if it is not based on the criteria. Only evidence relating to criteria is considered in the decision. Letter-writing campaigns by local citizens, whether in support of or in opposition to a petition, do not influence the recommendations that are made to the Assistant Secretary—Indian Affairs.

(Pet'r's Ex. 48, Email from Lee Fleming to George Skibine, et al. (July 20, 2004).) Following these Congressional meetings, Principal Deputy AS-IA Martin and Mr. Bernhardt were called to a meeting with three or four White House personnel, including then-Director of Domestic Policy, Margaret Spellings, in the West Wing to discuss the STN's acknowledgment process. (*See* Pet'r's Ex. 21, Shapiro Decl. P 4.) Ms. Martin believes that there were one or two subsequent meetings attended by Mr. Bernhardt and other high officials from the Department with White House representatives to discuss STN and the FD (*id.* P 5), though the parties have produced no documents or direct testimony to substantiate that those meetings occurred.

Meanwhile, STN's FD became the focus of House and Senate subcommittee hearings attended by DOI staff, members of Congress, AG Blumenthal, and others. *See* Fed. Recognition & Acknowledgment Process by the BIA: Hearing before the House Comm. on Res., 108th Cong., H.R. Serial No. 108-89 (March 31, 2004) (the "March 2004 Hearing"), at 1-2, 5-14, 90-97, 101-05; Betting on Transparency: Toward Fairness & Integrity in the Interior Dep't's Tribal Recognition Process: Hearing before the House Comm. on Gov't Reform, 108th Cong., H.R. Serial No. 109-198 (May 5, 2004) (the "May 2004 Hearing"), at 2, 7, 21, 28, 31-33, 54-55, 59, 65-66, 97-98, 101-02, 104-06, 130, 143, 146, 176, 196; Oversight Hearing on the Fed. Recognition of Indian Tribes: Hearing before the Sen. Comm. on Indian Affairs, 109th Cong., S. Hrg. 109-91 (May 11, 2005) (the "May 2005 Hearing"), at 9-10, 14-15, 17, 39, 93-94, 107-09, 114-15, 119-20, 133-37, 140-41, 145-46, 149-52, 181-83, 211. At the March 2004 Hearing before the House Committee on Resources, Representative Johnson called on the Committee to "invalidate the Schaghticoke decision," which she described as "flawed and illogical," and "impose a moratorium on [all] BIA acknowledgment decisions pending a comprehensive review of the BIA process." March 2004 Hearing at 8, 14. Representative Shays testified that the agency decided to grant STN recognition "even though it seemed clear that they did not meet the BIA criteria for proving continuity from pre-colonial times." *Id.* at 9. The "unfortunate reality highlighted" by the STN decision, Shays added, "is that the BIA quite clearly did not decide this case on the merits." *Id.* Representative Simmons testified that the "record is clear that BIA is breaking its own rules to reach their own desired outcome and that of petitioning groups and their wealthy financial

backers. The recent Schaghticoke decision is a case in point." *Id.* at 11. OFA Director Lee Fleming was present to witness these and similar comments. *Id.* at 77-78.

At the May 2004 Hearing before the House Committee on Government Reform, Chairman Tom Davis acknowledged in his opening statement that the reason for the hearing was to address the concerns of the Connecticut Congressional Delegation with respect to the acknowledgments of STN and the Connecticut-based Eastern Pequots. May 2004 Hearing at 2. Connecticut Attorney General Richard Blumenthal testified that the STN FD was:

> as unprincipled as it [was] unprecedented. Never before has the BIA recognized a tribe that is admitted by the agency itself to completely lack evidence on two key required standards over decades. . . . And never before has the BIA so twisted and distorted State recognition to cover its deliberate disregard for absent evidence.

Id. at 28. Theresa Rosier, Counselor to the AS-IA, and Inspector General Earl E. Devaney testified at the May 2004 Hearing, and they were repeatedly asked by the Committee to defend the FD or concede that the agency had erred, culminating in a heated exchange in which Representative Simmons apologized for losing his temper. *Id.* at 55. Representative Wolf interjected by referring to the "corrupt [acknowledgment] process" and suggesting that the Department should be "held in disgrace" in the memory of all prior secretaries. *Id.* He added that the Department had made a mistake in not imposing a moratorium on all acknowledgment decisions and, if it was not fixed, "the fault would lie at the steps of Secretary Gale Norton and this Administration." *Id.*

Representative Shays also questioned Theresa Rosier extensively on the evidence necessary for a tribal group to present to demonstrate continuity. *See id.* at 61. OFA Director Lee Fleming was present for this hearing but did not testify. *Id.* at 36.

On March 3, 2005, Representative Johnson introduced legislation in the House of Representatives titled the "Schaghticoke Acknowledgment Repeal Act." H.R. Res, 109th Cong. (2005) (Pet'r's Ex. 33.) In a press release issued on March 4, 2005, Representative Johnson, explaining why she introduced the bill, stated:

> The BIA's decision was erroneous and unlawful, and it simply cannot be allowed to stand. . . . This decision was made by ignoring evidence, manipulating federal regulations and overturning precedent. The consequences of this decision, including a casino in Western Connecticut, would be deep and irreversible. Local taxpayers would face increased financial burdens, our infrastructure would be overwhelmed by the round-the-clock traffic, and huge areas would be subject to land claims. This bill makes sure that the people of Western Connecticut are not made to pay for the erroneous and unlawful decision of the BIA.

(Pet'r's Ex. 34, Press Release, Representative Nancy Johnson, Johnson Introduces Bill to Repeal Schaghticoke Recognition (March 4, 2005), at 2-7.)

On May 11, 2005, the Senate Committee on Indian Affairs held an Oversight Hearing on the Federal Recognition of Indian tribes. Governor Rell, AG Blumenthal, and almost the entire Connecticut Congressional delegation participated in the hearing, prompting BGR lobbyist to consider it an "impressive

turnout." (Monroe Dep. 314:19-315:5.) AG Blumenthal asked that Congress abolish the OFA's tribal recognition authority and impose a six-month moratorium on all recognition decisions, explaining in his written testimony that "the BIA's political leaders have disregarded the [seven mandatory criteria], misapplied evidence, and denied state and local governments a fair opportunity to be heard." May 2005 Hearing at 89. Governor Rell testified that the "BIA is awarding Federal recognition to tribes regardless of evidence to the contrary," adding that "historical reservation lands no longer exist as such, and haven't for well more than two hundred years. They are now cities and towns, filled with family homes, churches, schools, shopping areas, and the like." *Id.* at 13-14. Senator Lieberman attacked the FD as an example of a "process that smacks of outright manipulation and abuse of government authority." *Id.* at 139. Representative Johnson testified that the OFA's "erroneous and unlawful decision to acknowledge the [STN] was made by ignoring evidence, manipulating federal regulations, and overturning precedent." *Id.* at 133. Representative Simmons stated, "Indeed, there is no better example of this disregard for the regulations in place than in the case of the Schaghticoke decision." *Id.* at 181. OFA Director Lee Fleming and Deputy Inspector General Mark Kendall also appeared at the May 2005 hearing and testified on behalf of the agency. *Id.* at 15.

In early 2005, Secretary Norton delegated to James Cason certain duties of the Assistant Secretary—Indian Affairs, including acknowledgment decisions. Contrary to Petitioner's representation of the evidence presented, Mr. Cason testified that at some point in 2005 he told Secretary Norton that he would

be making the reconsidered final determination. He did not recall when that occurred, but the conversation was short and he told her what the outcome would be. Secretary Norton responded "okay, fine," and did not urge him to take any position in particular, nor did she inquire about the substance of the decision. She also did not tell Mr. Cason her views on the original positive determination, and he never inquired of her whether she had been involved in the positive determination because "it was not relevant." (Cason Dep. 106:16-108:13.)

4. The IBIA and The RFD

While the political actors worked to encourage the BIA to reverse its STN FD and/or impose a moratorium on the review of federal acknowledgment petitions, the Intervenors filed a timely request for reconsideration of the FD with the Interior Board of Indian Appeals ("IBIA"). Among other things, the Intervenors argued that: (1) the FD erroneously used the State's relationship with the Schaghticoke as a substitute for otherwise wholly absent or insufficient evidence of community and political authority; (2) the analysis of Schaghticoke marriage rates were improperly calculated and used to satisfy criteria (b) and (c) for extensive periods, contrary to the regulations and prior precedent; and (3) the FD's conclusion that criteria (b) and (c) are satisfied despite the inability of the STN to enroll a large number of significant Schaghticoke individuals was based on unlawful administrative fiat rather than probative and reliable evidence. The Intervenors and STN filed briefs addressing these issues. After briefing was concluded, OFA filed a "Supplemental Transmittal" on the marriage issue, in which it stated that the FD "is not consistent with prior [acknowledgment] precedent in

calculating the rates of marriages under [25 C.F.R. §] 83.7(b)(2)ii), provides no explanation for the inconsistency[, and] there is no evidence that the [FD] intended to deviate from precedent." (Pet'r's Ex. 73.) The OFA also stated that there was a material mathematical error that lowered the marriage rates below the threshold 50 percent for one period and that the marriage rate analysis should accordingly not be affirmed. (*Id.* at 3.)

In a decision dated May 12, 2005, the IBIA vacated the FD and remanded the STN petition to the BIA for further consideration. In re Fed. Acknowledgment of Schaghticoke Tribal Nation, 41 IBIA 30 (2005) (Pet'r's Ex. 112). Following its decision in In re Federal Acknowledgment of the Historical Eastern Pequot Tribe, 41 IBIA 1 (2005) ("Eastern Pequot"), issued the same day, the IBIA concluded that the State of Connecticut's 'implicit' recognition of STN as a distinct political body "is not reliable or probative evidence for demonstrating the actual existence of community or political influence or authority within that group." 41 IBIA at 34. Rather, "the evidentiary relevance and probative value of such a [state] relationship depends on the specific nature of the relationship, the specific underlying interaction between a state and a petitioner, and how that relationship and interaction reflect in some way one or more of the elements in the definitions of 'community' or 'political influence or authority' contained in section 83.1" of the regulations. *Id.* at 16. To be probative, the state relationship "would need to be more than 'implicit,' and would need to be expressed in some way that reflected the actual or likely existence of those interactions and social relationships" within the petitioner's membership. *Id.* at 18. The IBIA concluded such a state relationship must be deter-

mined on a case- and fact-specific basis. *Id.* at 16. Similarly, the IBIA concluded that 'implicit' state recognition failed to meet the political criterion of 83.7(c). The essential requirement of criterion (c) is "that group leaders influence the opinions or actions of a substantial number of group members on issues regarded as significant to the group as a whole and [that] the actions of leaders are influenced by the group." *Id.* at 3. "We fail to see how 'implicit' state recognition of a group as a political entity constitutes probative evidence that the group actually exercises political influence or authority, and that there are actually leaders and followers in a political relationship." *Id.* Concluding that the use of state recognition was a substantial portion of the evidence relied upon by the Department and could affect the Department's ultimate decision, the IBIA vacated and remanded the FD to the Department. *Id.* at 21-23, 34; 25 C.F.R. § 83.11(d)(2).

After the matter was remanded, STN filed a motion in this Court to compel the BIA to receive additional evidence and to provide technical assistance. In an order dated July 23, 2005, the Court permitted the BIA to provide a technical assistance letter, the parties to submit new documents or historical evidence, and the parties to file supplemental briefs on the marriage rate issue. (*See* Order on Motion to Amend Scheduling Order, Doc. No. 26, Nos. H085-1078 (PCD), 3:98-cv-1113 (PCD), 3:00-cv-0820 (PCD) (July 28, 2005).)

On October 11, 2005, Associate Deputy Secretary James E. Cason issued the RFD denying STN's petition. Following the IBIA's directions that state recognition in and of itself could not be used as evidence of community or political authority, *see* RFD

at 45, the RFD reevaluated the State's relationship with the Schaghticoke and determined that "it does not provide evidence for political influence or authority within the Schaghticoke, and the State did not formulate its policies towards the Schaghticoke based on the recognition of the existence of bilateral political relations within the Schaghticoke." *Id.* at 58. The RFD also analyzed the marriage rates within the Schaghticoke group during the nineteenth century, applying different methodology than had been employed in determining the FD, and concluded that marriage rates never exceeded the 50 percent threshold required to satisfy criteria (b) and (c). *Id.* at 36. The RFD therefore concluded that there was insufficient evidence to satisfy the community criterion for approximately 54 years, from 1920-1967 and from 1997-2004, using evidence either under § 83.7(b)(2), or a combination of evidence under § 83.7(b), *id.* at 45, and that there was insufficient evidence to demonstrate political influence or authority over its members from 1801-75, from 1885-1967, and from 1996-2004, for a total of approximately 165 years. *Id.* at 58, 62. Accordingly, the RFD found that STN had failed to provide sufficient evidence to demonstrate that it was an Indian tribe entitled to acknowledgment of a government-to-government relationship with the United States.

C. Congressional Interference

STN first petitions this Court to invalidate the RFD on the grounds that it is the impermissible product of undue political interference by federal and state legislators and their lobbyists with the Department's decision making process. The BIA's federal acknowledgment process is an adjudicative process. *Golden Hill Paugussett Tribe of Indians v. Rell*, 463

F. Supp. 2d 192, 200 (D. Conn. 2006). An administrative adjudication is "invalid if based in whole or in part on [congressional] pressures." *District of Columbia Fed'n of Civic Ass'ns v. Volpe*, 148 U.S. App. D.C. 207, 459 F.2d 1231, 1246 (D.C. Cir.), *cert. denied*, 405 U.S. 1030, 92 S. Ct. 1290, 31 L. Ed. 2d 489 (1972) ("Volpe"). "Congressional interference so tainting the administrative process violates the right of a party to due process of law." *ATX, Inc. v. United States Dep't of Trans.*, 309 U.S. App. D.C. 367, 41 F.3d 1522, 1527 (D.C. Cir. 1994) (citing *Volpe*, 459 F.2d at 1245-49). "A court must consider the decisionmaker's input, not the legislator's output. The test is whether 'extraneous factors intruded into the calculus of consideration' of the individual decisionmaker." *Peter Kiewit Sons' Co. v. United States Army Corps of Eng'rs*, 230 U.S. App. D.C. 72, 714 F.2d 163, 170 (D.C. Cir. 1983) ("Kiewit") (quoting *Volpe*, 459 F.2d at 1246).

Congressional interference in the administrative process is of particular concern in a quasi-judicial proceeding, and judicial review of such a process is guided by two principles. *ATX, Inc.*, 41 F.3d at 1527. First, "the appearance of bias or pressure may be no less objectionable than the reality." *Volpe*, 459 F.2d at 1246-47 (emphasis added); *see also Koniag, Inc. v. Andrus*, 188 U.S. App. D.C. 338, 580 F.2d 601, 610 (D.C. Cir.), *cert. denied*, 439 U.S. 1052, 99 S. Ct. 733, 58 L. Ed. 2d 712 (1978) (congressional letter "compromised the appearance of the Secretary's impartiality"). Second, "judicial evaluation of the pressure must focus on the nexus between the pressure and the actual decision maker." *ATX, Inc.*, 41 F.3d at 1527 (emphasis in original). "The proper focus is not on the content of congressional communications in the abstract, but rather upon the relation between the communications and the adjudicator's decision

making process." *Kiewit*, 714 F.2d at 169-70. With respect to the nexus requirement, courts have "never questioned the authority of congressional representatives to exert pressure," *ATX, Inc.*, 41 F.3d at 1528 (citing *Volpe*, 459 F.2d at 1249), and "congressional actions not targeted directly at the decision makers—such as contemporaneous hearings—do not invalidate an agency decision." *Id.* (citing *Koniag*, 580 F.2d at 610).

There is no question that political actors exerted pressure on the Department over the course of 2004 and 2005 in opposition to the FD's acknowledgment of STN, both publicly through Congressional hearings and media publicity and privately through meetings and correspondence with the Secretary and other agency officials. The issue for the Court to determine is whether the evidence presented shows that the pressure exerted can be deemed to have actually influenced the decision maker who issued the RFD. In this case, the evidence presented does not persuade the Court that the Congressional hearings, ex parte communications between legislators and agency officials, or the publicity on the issue as a whole ultimately affected the Department's decision to issue the RFD.

Congressional hearings are not inherently improper whenever their inquiry touches on or arises from a pending administrative matter. *ATX, Inc.*, 41 F.3d at 1527-28. Such hearings, even if contemporaneous with an administrative proceeding, are not unusual and do not constitute improper interference or pressure when the inquiry does not probe the decision maker's mental process and does not specifically encourage the decision maker to make its decisions on grounds other than required by applicable law. *Id.*

There have been instances where courts have found that Congressional hearings have interfered with ongoing quasi-judicial agency procedures, *see, e.g.*, *Pillsbury Co. v. Fed. Trade Comm'n*, 354 F.2d 952 (5th Cir. 1996), and courts should not "shrug off a procedural due process claim merely because the officials involved should be able to discount what is said and to disregard the force of the intrusion into the adjudicatory process." *Id.* at 964. However, in Pillsbury, the leading case on this issue, Senators at the Congressional hearing point-blank asked the Federal Trade Commissioner, the actual decision maker in the pending agency process, why he had made specific decisions in regards to the petition under review, to the point that he felt compelled to recuse himself from the commission proceedings following the Senate hearings. *Id.* at 952-54. Where Congressional hearings do not call the actual decision maker to testify on a pending decision, however, the hearing does not amount to improper influence which warrants invalidating the subsequent agency decision. For example, in *Koniag, Inc., Village of Uyak v. Andrus*, 188 U.S. App. D.C. 338, 580 F.2d 601 (1978), the petitioners moved to invalidate DOI decisions finding certain native Alaskan villages ineligible to take land and revenues under the Alaska Native Claims Settlement Act when congressmen expressed disagreement with prior eligibility determinations at a Congressional hearing contemporaneous to the agency's review of petitioners' claims. The D.C. Circuit Court of Appeals held that Pillsbury was not controlling because none of the witnesses called before the Subcommittee was a decision maker in the petitioners' cases. *Id.* at 610. Even if Pillsbury extended to the advisers of the decision maker who were present at the hearing, those advisors weren't

called on at the hearing to prejudge any of the pending claims. *Id.* (citing *Pillsbury*, 354 F.2d at 964).

The Congressional hearings in this case reviewing the BIA's acknowledgment processes do not amount to undue interference with the Department's RFD of STN's status. There is no question that, as discussed above, various members of Congress as well as the Connecticut Governor and AG expressed their disapproval with the STN acknowledgment at the Congressional hearings on the subject, and the hearings became heated on at least one occasion. However, nothing in the record shows that these hearings had any impact on Associate Deputy Secretary Cason, the decision maker for the RFD. The Secretary's legislative liaison David Bernhardt testified that he was generally aware of the hearings but did not discuss them with Cason. (Bernhardt Dep. 121.) Secretary Norton could not even recall anything about the hearings at her deposition (Norton Dep. 187, 190-91, 212), and Cason could not recall knowing about the hearings or being told anything about them. (Cason Dep. 47-49.) OFA Director Lee Fleming was present at the hearings, but he testified at his deposition that he was not intimidated or influenced by any of the congresspersons or the Attorney General. (Fleming Dep. 170-72.) The fact that Representative Johnson introduced legislation to specifically reverse the Department's acknowledgment of STN also does not constitute undue influence that should invalidate the RFD because legislation does not solely address agency decision makers. *ATX, Inc.* 41 F.3d at 1528 (citing *Koniag*, 580 F.2d at 610). Moreover, Norton, Cason, and Bernhardt all testified that they had no recollection of the Johnson bill, which tends to suggest that it did not seriously impact their decision

making. (*See* Norton Dep. 245; Cason Dep. 40-41; Bernhardt Dep. 119-20.)

Similarly, nothing in the record convinces the Court that the legislators' ex parte communications, either through written correspondence, public announcements, or at meetings with Department officials, actually influenced the decision making process resulting in the RFD. Although the Capitol Hill meetings were admittedly heated and unquestionably arranged so as to lobby Secretary Norton to revise the acknowledgment determination, the record does not show a nexus between them and the agency's ultimate decision to revise the STN acknowledgment decision. Both Cason and Fleming testified that no one talked to them about the particularly contentious meeting at which Representative Wolf threatened Secretary Norton (*see* Cason Dep. 53-54; Fleming Dep. 65-67), and Secretary Norton testified that she did not take the threats seriously. (Norton Dep. 168-9, 275-76.) The Department officials deposed in this case uniformly testified that none of these communications, or any other Congressional activity, had any impact on the decision making process that culminated in the RFD. (*See* Norton Dep. 112, 183, 161; Cason Dep. 91-92; Fleming Dep. 168-75, 190-93.) There is no evidence that Mr. Cason even had any direct contact with the Connecticut Congressional delegation, the White House, any state officials, or any lobbyist concerning STN. At his deposition, Cason testified that he did not receive, directly or indirectly, any communication from the Connecticut Congressional delegation, any state officials, or BGR, and he did not consider any factors or criteria that were not discussed in the RFD. (Cason Dep. 50-51, 65-66, 75-76, 82, 130.) *See Kiewit*, 714 F.2d at 170 (decision maker not "tainted" by

Congressional power where no evidence that the ultimate decision maker was aware of a Senator's letters to Department of Defense, no evidence the Senator contacted him directly, and no evidence that the Department officials who had spoken to the Senator then contacted the decision maker.). Although one may be sympathetic to STN's suspicions that powerful political forces interfered with an independent review of their tribal recognition, the Court must accept the evidence as presented at face value, in particular the testimony by the agency decisionmakers that they were not unduly pressured by particular politicians or the political climate at large.

In sum, the evidence presented by STN does not show that the legislative activity actually affected the outcome on the merits by the BIA. *See ATX, Inc.*, 41 F.3d at 1529; *Kiewit*, 714 F.2d at 169; *Volpe*, 459 F.2d at 1246. Nothing suggests that the actual decision maker was impacted by the political pressure exerted by state and federal legislators or their surrogates. Neither the IBIA decision nor the RFD mentioned the testimony of the congresspersons, the congressional letters, or the proposed legislation, *see ATX, Inc.*, 41 F.3d at 1529, and the Secretary and other deposed Department officials testified that the Congressional delegation had no impact on their work or ultimate decisions. Granted, it may be the case that Congressional pressure compromises an administrative proceeding even where the record would allow the decision maker to reach the same conclusion independently. *ATX, Inc.*, 41 F.3d at 1530. An administrative decision must be based "strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes." *Volpe*, 459 F.2d at 1246. Here, however, the

nexus between the pressure exerted and the actual decision makers is tenuous at best, and the evidence adequately establishes STN's ineligibility for tribal recognition. *See ATX, Inc.*, 41 F.3d at 1530. Accordingly, the Court concludes that political influence did not enter the decision maker's "calculus of consideration." In the absence of such interference, there is no clear violation of STN's due process rights to justify this Court's extraordinary interruption of the administrative process. *See Kiowit*, 714 F.2d at 170

C. Arbitrary & Capricious

Petitioner STN next argues that the RFD must be invalidated because it is arbitrary and capricious. STN contends that the Department's RFD was arbitrary and capricious because the Department's state recognition analysis in the RFD failed to adhere to the IBIA's decision and inadequately explained its reasoning. STN also contends the RFD was arbitrary and capricious because STN has in fact satisfied the marriage rate criterion of § 83.7(c) and the methodology employed by the Department in the RFD to determine STN marriage rates was unreasonable, arbitrary, and capricious. STN has a heavy burden of proof in establishing that the Department's RFD cannot withstand judicial review. An agency's interpretation of its own regulations is entitled to deference, *Chevron v. Nat'l Res. Def. Council*, 467 U.S. 837, 844-45, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); *Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997); *Masayesva v. Zah*, 792 F. Supp. 1178, 1187 (D. Ariz. 1992) (same in the context of a BIA regulation), as is the weight given to the evidence by the agency. Miami Nation of Indians, 55 F. Supp. 2d at 925. Because evidence of both community and political influence or authority throughout

history are mandatory criteria under the federal acknowledgment regulations, this Court will only remand the petition to the agency if it finds that the decision on each of the criteria was arbitrary and capricious under the APA. As long as the evaluation of the evidence under 83.7(b) and (c) in the RFD is reasonable based on the agency's interpretation of the regulations, the RFD should be affirmed.

1. State Recognition

In remanding the state recognition issue to the Department, the IBIA instructed the Department to "articulate specifically how the State's actions toward the [petitioner] during the relevant time period(s) reflected or indicated the likelihood of community and political influence or authority within" STN, as those concepts are defined in 25 C.F.R. § 83.1. 41 IBIA at 21. STN also contends that it was incumbent upon the Department to explain the constitutional federalism principles which Secretary Norton had considered in evaluating the weight to place on implicit state recognition, although nothing in the regulations themselves or the IBIA decision mandates the Department to do so. STN now argues that instead of attempting to support its prior decision under the new IBIA standards, it reached a "completely different decision that had nothing to do with the IBIA's new standards or the policy considerations that the Department had originally relied on." (Pet'r's Mem. in Supp. of Mot. for Summ. J. at 68.) This is a gross overstatement which misinterprets the IBIA's ruling and misrepresents the RFD, which presented a reasonable and cogent analysis of the state recognition issue as instructed by the IBIA.

An agency is entitled to reverse course on a decision, so long as it provides a reasoned analysis for

doing so. *State Farm*, 463 U.S. at 56, 103 S. Ct. 2856. Having reviewed the RFD, the Court concludes that the Department came to a researched and well-reasoned conclusion regarding the state recognition issue. STN contends that the Department's reconsidered state recognition analysis was "truncated, conclusory, [and] nonsensical." (Pet'r's Mem. at 76.) This representation of the analysis in the RFD is baseless. The RFD devotes 13 pages to an analysis of the IBIA's state recognition instructions and a re-evaluation of the evidence presented proving the elements of state recognition. *See* RFD at 45-58. STN also argues that the absence of other evidence in the record to shed light on the Department's new conclusions regarding the state recognition issues renders it unreasonable. However, the RFD stands on its own, without any explanation by supplementary notes, memoranda, email, or other documents to provide insight into the Department's analytic process.

STN argues that the RFD fails to explain why the Department no longer believed that the state recognition evidence contained in the record was entitled to any weight with respect to criteria (b) and (c) when in the FD it had considered that same evidence to be strong and probative. However, contrary to STN's interpretation of the IBIA decision, the IBIA did not merely require the BIA to provide a better explanation for the weight it had accorded state recognition. Rather, the IBIA clearly concluded that the FD's use of the State's 'implicit' recognition of the STN as a 'distinct political body' was not reliable or probative evidence for demonstrating the actual existence of community or political influence or authority required for federal tribal acknowledgment. 41 IBIA at 34. Although it is correct that the IBIA did not conclusively prohibit the use of evidence relating to a

state's relationship, it definitively concluded that the FD had used state recognition that was inconsistent with the acknowledgment regulations. *Id.* The IBIA instructed the BIA that if state recognition was to be used as evidence, the BIA needed to identify aspects of the State's relationship with the Schaghticoke that in fact demonstrated that the Schaghticoke had existed as a community and had exercised political authority; the mere existence of a relationship between the State and the group or its members could not alone fill in the large historical gaps in the evidence of community or political authority. *See* 41 IBIA at 16 ("In order for the State's relationship to be probative of the first part of the definition of 'community,' it would need to be more than 'implicit,' and it would need to be expressed in some way that reflected the actual or likely existence of those interactions and social relationships."); *Id.* at 18 ("Once again, we fail to see how 'implicit' state recognition of a group as a political entity constitutes probative evidence that the group actually exercises political influence or authority. . . . Rather, there needs to be more than 'implicit' recognition, and the relationship between the State and the group needs to be expressed in some way that reflects the existence or likely existence—not simply theoretical or presumed—of political influence or authority within the group[.]"). The IBIA then specifically evaluated the four elements of the State's relationship that had been relied on by the BIA to support its use of state recognition as evidence and found them all lacking probative value. *Id.* at 16, 20-21, 34.

Following the instructions of the IBIA, the RFD also reexamined the State's relationship with the Schaghticoke, concluding, as it had in the FD, that the State's relationship was not explicitly or

implicitly based on a recognition of a government-to-government relationship with the Schaghticoke or on the existence of bilateral political relations within the group. RFD at 48; *see also* FD at 14. The RFD then proceeded to reevaluate the underlying elements of the State's relationship which had previously been used to support the use of state recognition: the purported noncitizenship status of Indians in Connecticut, *see* RFD at 49, the overseer system which had oversight responsibilities as to Connecticut Indians, *see id.* at 50, the continuous existence of a Schaghticoke reservation, *see id.* at 50, 53-58, and the rationale for the State's historical relationship with the Schaghticoke. *Id.* at 51. It is not necessary for the Court to reiterate the evidence presented regarding each of these elements or the RFD's analysis of such evidence. Suffice it to say that in considering each of the elements, the RFD presents a thorough, rational, and well-reasoned evaluation, leading to the conclusion that they do not add up to demonstrate the actual existence of a political community throughout most of the history of the Schaghticoke. The record supports the DOI's conclusion on remand that the State's relationship, as understood through an examination of each of the underlying elements and supporting record evidence, does not provide the missing evidence of community and political authority that STN lacks to meet the acknowledgment criteria.

STN devotes extensive space in its briefs to emails between OFA staffers who drew different conclusions about the state recognition, as well as to the FD's analysis of the State recognition issue. However, the fact that reasonable minds within an agency may differ in opinion on a given issue does not render the final analysis of the RFD any less rational or defensi-

ble. Similarly, the fact that the FD was well reasoned is beside the point when the IBIA specifically overruled its state recognition analysis and instructed the BIA to take a second look at the available evidence. STN also argues that the Department's change in position between the FD and the RFD "must have" been caused by political pressure, but there is no evidence in the record suggesting a direct link between the lobbying of certain Department officials and the reevaluation of the state recognition issue in the RFD. On the contrary, the RFD's reasoned explanation of the state recognition reevaluation, premised on an accurate reading of the IBIA's instructions on remand, and without any other evidence suggesting improper influence on this particular issue, withstands judicial scrutiny.

2. Marriage Rates

STN also claims that the RFD is arbitrary and capricious because its analysis of marriage rates was contrary to the acknowledgment regulations, methodologically flawed, and lacking a reasonable explanation for its decision. A petitioner satisfies the community criterion of 25 C.F.R. § 83.7(c) for any period in which it has demonstrated that "[a]t least 50 percent of the marriages in the group are between members of the group." 25 C.F.R. §§ 83.7(b)(2)(ii) and (c)(3). STN had submitted evidence and analysis of its marriage rates throughout the 19th century. OFA evaluated this evidence and concluded in the FD that STN had demonstrated sufficient marriage rates to receive the benefit of the "carryover" provision under § 83.7(b)(2)[8] to meet its burden of proof to demon-

[8] Section 83.7(c)(3) links the community criterion in section (b) with the political authority criterion in section (c) by providing that a petitioner which has met § 83.7(b)(2) for a particu-

strate political influence or authority under § 83.7(c)(3) for the periods from 1800 to 1820 and from 1840 to 1870.

The parties dispute the proper methodology for calculating marriage rates for purposes of the acknowledgment requirements. STN presented a particular analysis which the OFA adopted and included in the FD. In their motion for reconsideration, the State Intervenors argued that STN's marriage rate analysis overvalued the number of in-group marriages by counting individual STN members, rather than the marriages between two STN members. In December 2004, after STN submitted its reply to the State's reconsideration request to the IBIA, the Solicitor's Office of the DOI filed a Supplemental Transmittal which expressed concern that the OFA may have used an incorrect methodology in calculating in-group marriage rates and informed the IBIA that it could not affirm the FD "absent explanation or new evidence." (Pet'r's Ex. 73 at 203.) On reconsideration, the IBIA did not consider whether the OFA had in fact used the correct marriage rate methodology in the FD. Instead, it remanded the issue back to the Department:

> Because we are already vacating and remanding the FD to the Assistant Secretary for reconsideration based on Historical Eastern Pequot Tribe, and because OFA has acknowledged problems with the FD's endogamy rate calculations—at a minimum, inadequate explanation—we conclude that this matter is

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lar time period is deemed to have provided sufficient evidence to "carryover" and thereby satisfy criterion (c) for that time period as well.

best left to the Assistant Secretary on reconsideration.

41 IBIA at 34.

The RFD devotes 30 pages to the marriage rate analysis, *see* RFD at 6-36, and explains that the purpose of calculating marriage rates within the group under § 83.7(b)(2) concerns the "social links" within the group established by marriages. "The ratio of links [marriages] within a group versus those outside the group provides a valid measure of the level of social cohesion within the community." RFD at 8. Accordingly, the RFD's reevaluation of the marriage rate issue employed a methodology focusing on the number of marriages between members of the STN group, rather than on the number of individual STN members who had chosen to get married either to other tribal members or to persons outside the group. The analysis in the RFD is premised on a reasonable interpretation of the regulation, to which this Court defers, *Auer v. Robbins*, 519 U.S. at 461, 117 S. Ct. 905 (an agency's interpretation of its regulation is "controlling unless plainly erroneous or inconsistent with the regulation") (internal citations omitted), and the agency's precedent in counting marriages under the acknowledgment regulations. Whereas the language in other subsections of § 83.7(b)(2) refer to 50 percent "of the members" or "of the group's members," the subsection at issue here discusses whether "50 percent of the marriages" are between members of the group. Compare §§ 83.7(b)(2)(i) and (b)(2)(iii) with (b)(2)(ii). Furthermore, the RFD cites as agency precedent a proposed finding for another petitioning tribal group which counted marriages, not individuals who got married, and specifically rejected the methodology that STN

seeks: "The acknowledgment regulations plainly refer to the percent of marriages, not the percent of members of the group affected. Thus, the percent of members participating in in-group marriages is not relevant evidence for the 50 percent requirement of the regulations." RFD at 10 (emphasis in original). (*See also* Intervenors' Ex. D, Little Shell Proposed Finding at 178-79.)[9] The RFD thoroughly engaged STN's proposed methodology and accompanying arguments but ultimately concluded that the "use of the term 'marriages' rather than 'individuals involved in marriages' within a group reflects the intent of the regulations to measure social links." RFD at 14. Deferring to the agency's choice of methodology and weight afforded the evidence before it, the Court concludes that the RFD's marriage rate analysis and accordant findings are reasonably explained and are not arbitrary or capricious.

STN insists that the RFD erred in relying on this interpretation and this methodology and advocates the use of a different endogamy methodology. The

[9] STN disputes that agency precedent employed the RFD's marriage rate analysis methodology, citing staff members' recollections, one in a hand-written note and one attested to in a declaration, that other acknowledgment decisions had used STN's proposed methodology. However, Respondents point to precedent from those acknowledgment decisions and show that they used the RFD's methodology, contrary to the recollections of individual staffers. (*See, e.g.* Intervenors' Ex. E, the Jena Band of Choctaw Indians Proposed Finding.) STN also submits evidence by staffers and other academics who recommend the STN's proposed methodology. However, the existence of an academic debate on the merits of different methodologies used in the marriage rate analysis does not undermine the Court's conclusion that in this instance the RFD made a principled, informed decision, based both on expertise and on agency precedent, to employ the particular methodology it did.

Court declines to engage in an academic debate about which endogamy methodology is most appropriate to employ in this instance. Even this Court's description of the marriage rate methodology issue is admittedly rudimentary, precisely because such anthropological debates are outside the purview of this Court's expertise. The Court is confident based on a review of the record that the professionals in the agency have engaged with the academic debates on this issue and made an informed, reasoned decision to make the marriage rate analysis it ultimately did in the RFD. The Court does note, however, that the methodology proposed by STN seems ill-suited to the regulations at hand. STN argues that any methodology for calculating marriage rates under § 83.7(b)(2)(ii) must exclude from consideration any marriage that are not marriages in the group, meaning marriages to outsiders are excluded from the calculation. (Pet'r's Mem. in Support of Mot. for Summ. J. at 87; *see also id.* at 88.) Ignoring marriages of group members to persons outside the group would always lead to marriage rates of 100%, a result which even a layperson would conclude is absurd and does not measure social cohesion as the regulations intend.

STN argues that the OFA's changed course on the marriage rate analysis must have been the result of the improper political pressure "with little to no input from the OFA professional staff" (Pet'r's Mem. at 87, 95), but the record instead shows that the RFD is the result of the OFA's deliberate, months-long investigation into the marriage rate analysis in the FD and the need to correct it on remand. The record demonstrates that OFA questioned the marriage rate calculation on reading the Intervenors' request for reconsideration before the IBIA, held a meeting on July 14, 2004 questioning the interpretation in the

FD, and set a meeting agenda in August 2004 to discuss the issue further. (*See* Admin. Record AC-VO15-D0005, BR-V013-D0050; Pet'r's Ex. 102.) These meetings culminated in a briefing paper prepared by OFA, dated November 16, 2004, which points out the inconsistency in the STN FD from acknowledgment precedent and provides options on how to proceed. (Fed. Resp'ts' Ex. H, "Briefing Paper on Schaghticoke Reconsideration Request," at 2.) In the briefing paper, OFA recommended that it file a transmittal before the IBIA to insure that the errors can be corrected and the IBIA was advised of the precedent. (*Id.*) OFA also noted the difficulty in remaining silent while the IBIA reviewed the case over the course of the year, raising "questions concerning how to evaluate acknowledgment cases" and "what technical advice to provide petitioners" in the interim. (*Id.*) This evidence all suggests the professional staff in the agency was doing its job reasonably and responsibly. (*See also* Norton Dep. 53, 58 (testifying that if a mistake was made, it needed to be corrected); Bernhardt Dep. 102-3 ("in order to maintain the integrity of the administrative process," the OFA should inform the IBIA of any error.).)

The Court also recognizes that the marriage rate analysis in the FD and the RFD impacts only 50 years of political influence criterion (c) but does not impact the deficiencies in evidence concerning political influence for the other 115 years for which the RFD found that STN failed to meet § 83.7(c). Thus, even if the RFD's marriage rate analysis was arbitrary and capricious, STN would still fail to meet political criterion (c) because of the other significant time periods for which it failed to provide evidence demonstrating political influence or authority.

3. Community and Political Authority between 1996 and 2004

STN also claims the RFD was arbitrary and capricious because it abandoned precedent and failed to explain its new reasoning when it determined that the STN had failed to satisfy criteria (b) and (c) for the period after 1996 on the basis that a significant number of Schaghticoke individuals refused to consent to STN membership. These individuals comprise two groups, the Schaghticoke Indian Tribe ("SIT") and members of the Coggswell family, who oppose the current leadership and federal recognition of STN. The SIT has submitted its own petition for federal acknowledgment, claiming that it, and not STN, is the true representative of the Schaghticoke tribal group. *See* 41 IBIA at 38. The Coggswell family agrees that the Schaghticoke satisfy the criteria for federal acknowledgment but does not recognize STN's current leadership as legitimate.

The PF determined that, for the period after 1996, STN satisfied neither criterion (b) or (c) because the STN's membership excluded a large number of individuals representing important family lines or sublines from the group's history, including members of the SIT group and members of the Coggswell family. (*See* Intervenors' Ex. A, PF at 20, 30, 212-13.) Following the PF, STN attempted to obtain the membership of several of these other individuals, though some of those individuals did not consent to membership. Accordingly, the FD concluded that key Schaghticoke individuals, such as former council leadership, in the community and political system as it existed before 1996 were not on the membership list, even though they were part of the STN community. Concluding that STN could not be recognized

without the unenrolled members constituting part of the tribe, the FD allowed the unenrolled members to be considered part of the membership, despite STN's repeated failed efforts to enroll them. FD at 56-57. The Intervenors and members of SIT and the Coggswell family raised the FD's treatment of the post-1996 membership on its motion for reconsideration before the IBIA, which concluded that the issue was outside its jurisdiction and referred it back to the Department for reconsideration. 41 IBIA at 40, 42.

On remand, the RFD reconsidered the FD's conclusion that STN satisfied criteria (b) and (c) for the period after 1996 because the unenrolled individuals could be deemed STN members until they affirmatively declined such status. The RFD considered evidence that, following the issuance of the FD, 33 of the 42 'unenrolled' members refused to consent to membership with STN. RFD at 61. Relying on *Masayesva v. Zah*, 792 F. Supp. 1178 (D. Ariz. 1992), the RFD concluded that "a necessary condition to membership [is] the existence of a bilateral political membership, which required consent on the part of both" the tribal group and the unaffiliated members. *Id.* Therefore, because 33 of the unenrolled individuals do not consent to be part of the STN, they are not considered members of STN for purposes of the federal acknowledgment regulations. *Id. See also* 25 C.F.R. § 83.1 (defining member of an Indian group as "an individual who is recognized by an Indian group as meeting its membership criteria and who consents to being listed as a member of that group.") (emphasis added). Focusing on the evidence presented that these members refused to consent to membership, the RFD made a reasonable decision that the STN's membership for the period following 1996 did not satisfy criteria (b) and (c) "because as defined by its

membership list, it does not constitute the entire community and political system." RFD at 62.

STN argues that the RFD's conclusion that these individuals were not part of STN lacked reasonable explanation, departed from precedent, and constituted a "last-minute reversal" which must have been the result of undue political interference. However, the PF had drawn a similar conclusion that STN failed to meet the community and political criteria in part because of the significance of the omission of these individuals from the membership. In a technical assistance letter to STN, the OFA advised that "it is very important that the STN membership substantially include these individuals and families," and "as it now stands the group is not the same group that was active from the 1960s to 1996." (Pet'r's Ex. 105 at 2-3.) STN claims that the agency told it that the group would meet its membership requirements if it amended its constitution to include the unenrolled members. However, the record clearly demonstrates that the agency's emphasis was not just on amending the STN constitution but on actually enrolling the important unaffiliated members and that STN understood the importance of including more historically significant members on its membership roll. (*See* Admin. Record SN V-063-D00006, SN-V063-D0011, OD-V001-D0010.) The RFD's decision is therefore reasonable based on the evidence before it and not so unfounded or suspiciously 'last-minute' to be arbitrary or capricious.

D. ADS Cason's Authority to Issue the RFD

Finally, STN claims that the RFD must be invalidated because it was made by an unauthorized official. STN contends that James Cason holds his full-time position as Associate Deputy Secretary

("ADS") and his delegation as Assistant Secretary—Indian Affairs ("AS-IA") in violation of mandatory constitutional and statutory provisions; therefore, lacking authority to act as he did, his decision must be null and void by operation of law. First, STN argues that Mr. Cason's position requires Presidential nomination and Senate confirmation pursuant to the Appointments Clause of the Constitution.[10] However, the position of Associate Deputy Secretary is not a "principal" officer of the United States who must be appointed by the President and confirmed by the Senate. The Comptroller General reviewed Mr. Cason's appointment in 2002 and determined that in his role as ADS he was "properly appointed to his position as a Non-Career Senior Executive Service federal employee." *See* Comptroller General of the United States Opinion B-290233, 2002 U.S. Comp. Gen. LEXIS 265, at *2 (Oct. 22, 2002). As such, he is not a "principal" officer such as an agency head who must be nominated by the President and confirmed by the Senate. *See Buckley v. Valeo*, 424 U.S. 1, 125, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); *Edmond v. United States*, 520 U.S. 651, 663, 117 S. Ct. 1573, 137 L. Ed. 2d 917 (1997); Opinion B-290233, 2002 U.S. Comp. Gen. LEXIS 265 at *17 (notwithstanding Cason's high degree of expertise and skill," the

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[10] The Appointments Clause states that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint. . . . all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., Art. II § 2, cl. 2.

Associate Deputy Secretary is one of the lesser functionaries").

At best, Cason is an inferior officer, not a principal officer, because he is always subject to the supervision and authority of the Deputy Secretary and Secretary, who are both Presidentially appointed and Senate confirmed. The fact that the ADS serves at the pleasure of the Secretary and can be removed by him at any time is indicative of his subordinate role to the Secretary. *See Edmond*, 520 U.S. at 663, 117 S. Ct. 1573 ("'The power to remove officers . . . is a powerful tool for control" and a significant factor in the principal versus inferior officer analysis.); *see also Morrison v. Olson*, 487 U.S. 654, 671, 108 S. Ct. 2597, 101 L. Ed. 2d 569 (1988) ("First, appellant is subject to removal by a higher Executive Branch officer"); *Silver v. United States Postal Serv.*, 951 F.2d 1033, 1038-39 (9th Cir. 1991) ("The significance of appointment and removal power is well established in Appointments Clause jurisprudence."). Thus, while Mr. Cason has responsibility for important duties in the Department, "the fact that []he can be removed by the [Secretary] . . . indicates that []he is to some degree 'inferior' in rank and authority." *Morrison*, 487 U.S. at 671, 108 S. Ct. 2597. As an inferior officer, Mr. Cason need not be appointed by the President and confirmed by the Senate, *see Buckley*, 424 U.S. at 132, 96 S. Ct. 612, and STN's *Appointments Clause* argument therefore has no merit.

STN also argues that Mr. Cason's performance of the duties of the AS-IA constitutes a separate statutory violation. The Vacancies Reform Act ("VRA"), 5 U.S.C. §§ 3345 et seq., governs how a vacancy in a position held by an official appointed by the President with the advice and consent of the Senate

("PAS") may be filled on an 'acting' basis. *See id.* § 3345. The VRA requires that the employee who holds the position of 'first assistant' to the absent PAS shall automatically perform the functions and duties of the PAS position, unless the President designates another person to temporarily perform the functions or duties of the PAS. The Department's orders of succession for the AS-IA establishes that the PD-ASIA is the first assistant to the AS-IA, who would, upon a vacancy, succeed to the office on an acting basis pursuant to 5 U.S.C. §§ 3345(a)(1). In early 2005, when the AS-IA resigned, the PD-ASIA position was vacant. Because no one was appropriately situated to become acting AS-IA, the Secretary delegated the non-exclusive functions and duties of the AS-IA position to the ADS, James Cason. STN contends that Cason was not statutorily authorized to act in the capacity of the AS-IA and therefore could not have properly issued the RFD.

In the case of a PAS vacancy not filled with an 'acting' official, the Act requires that the position remain vacant and that only the agency head may perform the "functions and duties" of the position. 5 U.S.C. § 3348(b). To ease the burdens on the agency head, however, Congress limited the "functions and duties" that must be performed by the agency head to those that are required by statute or regulation to be performed exclusively by the official occupying that position. 5 U.S.C. § 3348(a)(2). Accordingly, any functions or duties not required by statute or regulation to be performed by the official occupying that position may be reassigned to another official within the agency or department.

In February 2005, Secretary Norton issued an order delegating the authority delegated to the AS-IA

to the ADS, "except for those functions or duties that are required by statute or regulation to be performed only by the [AS-IA]." (Secretarial Order 3259, Fed. Resp'ts' Ex. 6.) The Order provided that the duties required by statute or regulation to be performed only by the AS-IA will be performed by the Secretary herself, in accordance with the VRA. (*Id.*)[11] The question before the Court is whether the authority to make tribal acknowledgment decisions is required by statute or regulation to be performed only or exclusively by the AS-IA.

The requirement to make acknowledgment decisions is not assigned by statute exclusively to the AS-IA. Acknowledgment decisions are governed by 25 C.F.R. Part 83, which cites as statutory authority the Secretary of Interior's general authority found at 5 U.S.C. § 301, 25 U.S.C. §§ 2 and 9, and 43 U.S.C. § 1457. These statutory sections do not even mention acknowledgment decisions, let alone assign the function "only" or "exclusively" to the AS-IA.

It is less clear whether the regulations limit acknowledgment determinations "exclusively" to the AS-IA, but the Court is ultimately not convinced that the delegation of such responsibilities to Mr. Cason was unlawful. Under the regulations, the AS-IA has responsibility for making acknowledgment determinations on behalf of the Secretary. *See* 25 C.F.R. Part 83. The regulation does not assign that responsibilities "exclusively," "only," or "solely" to the ASIA, though it does use the term "shall," arguably suggesting a mandatory instruction limited to the AS-IA. *Id.* § 83.1. However, the regulation contem-

[11] The Order also provided that it would automatically expire upon either the confirmation of a new AS-IA or upon the delegation of an Acting AS-IA in accordance with the VRA. (*Id.*)

plates that the AS-IA's responsibilities may be delegated to other agency officials: it defines the term Assistant Secretary to include the AS-IA "or that officer's authorized representative." *Id.* Furthermore, prior to the Secretary's delegation of duties to the ADS, the Department prepared a memorandum reviewing the functions and duties of the AS-IA to determine whether any such duties are required to be performed only by the AS-IA. (*See* Fed. Resp'ts' Ex. 5.) This memorandum identified three statutory sections assigning functions or duties exclusively to the AS-IA, but it found no regulations at all, and certainly none relating to acknowledgment decisions, which did so. (*Id.*) With this evidence before it, and without any case law stating the contrary, the Court accepts the Respondents' position that acknowledgment determinations are not a function or duty assigned by statute or regulation only to the AS-IA for purposes of the VRA, 5 U.S.C. § 3348.

STN does not extensively argue any differently; rather, it focuses its VRA argument on the contention that authority should have automatically been assigned to the First Assistant AS-IA, thereby rendering Cason's exercise of the AS-IA responsibilities unlawful. However, contrary to STN's representation of the situation, Cason did not assume the position of Acting AS-IA. Instead, the Secretary reassigned certain non-exclusive responsibilities of the AS-IA to him for a finite period of time, a course of action permissible within the VRA's statutory scheme. *See* S. Rep. 105-250 at 18-19; Guidance on Application of the Fed. Vacancies Reform Act of 1998, Dep't of Justice, Office of Legal Counsel (March 22, 1999), Question 48 ("the Act permits non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency."). STN also

attempts to show that Michael Olsen, who was Counselor to the AS-IA, was actually the PD-ASIA, the first assistant to the AS-IA who should have succeeded to the office of AS-IA upon a vacancy in accordance with 5 U.S.C. § 3345(a)(1). However, the evidence presented shows that Mr. Olsen was not appointed to the position PD-ASIA until June 2006, long after Cason, exercising the authority delegated to him by the Secretary in the absence of an AS-IA or an Acting AS-IA, issued the RFD.

STN also argues that Mr. Cason's fulfillment of the AS-IA responsibilities were unlawful because his service continued beyond the time limits of the VRA. These arguments are also meritless. The time limitations in Section 3346 of the VRA apply only to a person serving in an acting capacity under Section 3345. The VRA sets no time limits, however, on redelegations of nonexclusive duties. Therefore, the only time limitations relevant in this case are those set by the Secretary in her order delegating certain responsibilities to Mr. Cason, which extended beyond the date on which Cason issued the RFD.[12] For these reasons, STN has failed to show that Cason 12 was impermissibly exercising his authority when issuing the RFD and that it must be invalidated as an ultra vires decision.[13]

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[12] The Order was originally due to expire on August 14, 2005, but was twice amended to extend the expiration date. (*See* Fed. Resp'ts' Ex. 6, Order 3259; Order 3259 Am. No. 1 (Aug. 11, 2005); Order 3259 Am. No. 2 (March 31, 2006).)

[13] STN also argues that the Department failed to provide the notice required by the VRA, 5 U.S.C. § 3349, thereby invalidating Cason's authority to issue the RFD. This argument is premised solely on evidence that has been stricken from the record as inadmissible hearsay. Accordingly, the Court will not consider the argument any further.

IV. CONCLUSION

For the reasons stated above, STN has failed to meet its burden of showing that the RFD was the product of undue political interference, arbitrary and capricious, or outside the limits of the Appointments Clause or the Vacancies Reform Act. Accordingly, STN's Motion for Summary Judgment [Doc. No. 165] is denied. Respondents' Cross-Motion for Summary Judgment [Doc. No. 178] and the Intervenor-Respondents' Cross-Motion for Summary Judgment [Doc. No. 174] are granted. Respondents' Motion to Strike [Doc. No. 182] is granted in part and denied in part. Judgment shall enter for Respondents, and the Clerk shall close the file.

SO ORDERED.

Dated at New Haven, Connecticut, this 22nd day of August, 2008.

/s/ Peter C. Dorsey
Peter C. Dorsey, U.S. District Judge
United States District Court

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Filed 08/27/08]

Civil No. 3:06 cv 81 (PCD)

SCHAGHTICOKE TRIBAL NATION
Petitioner,

v.

GALE NORTON, SECRETARY DEPARTMENT OF THE INTERIOR, JAMES E. CARSON, ASSOCIATE DEPUTY SECRETARY DEPARTMENT OF THE INTERIOR, UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, INTERIOR BOARD OF INDIAN APPEALS AND DIRK KEMPTHORNE, SECRETARY DEPARTMENT OF THE INTERIOR
Respondents,

STATE OF CONNECTICUT, KENT SCHOOL CORPORATION, THE CONNECTICUT LIGHT AND POWER COMPANY, AND TOWN OF KENT
Intervenor-Respondents.

JUDGMENT

This matter came on for consideration on the petitioner's motion for summary judgment, respondents' cross-motion for summary judgment, and intervenor-respondents' cross-motion for summary judgment before the Honorable Peter C. Dorsey, Senior United States District Judge.

The Court has reviewed all of the papers filed in conjunction with the motions and on August 26, 2008, entered a Ruling denying petitioner's motion for summary judgment and granting respondents' cross-motion for summary judgment and intervenor-respondents' cross-motion for summary judgment.

It is therefore ORDERED and ADJUDGED that summmary judgment is entered for the respondents and intervenor-respondents and the case is closed.

Dated at New Haven, Connecticut, this 27th day of August, 2008.

ROBERTA D. TABORA, CLERK
By

/s/ Patricia A. Villano
Patricia A. Villano
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 08-4735-cv

SCHAGHTICOKE TRIBAL NATION,
Petitioner-Appellant,

v.

DIRK KEMPTHORNE, Secretary, Department of the Interior, JAMES E. CASON, Associate Deputy Secretary, Department of the Interior, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, and INTERIOR BOARD OF INDIAN APPEALS,
Respondents-Appellees,

THE KENT SCHOOL CORPORATION, STATE OF CONNECTICUT, TOWN OF KENT, and THE CONNECTICUT LIGHT AND POWER COMPANY,
*Intervenors-Respondents-Appellees.**

October 8, 2009, Argued
October 19, 2009, Decided

JUDGES: Before: MINER and CABRANES, *Circuit Judges*, and KORMAN, *District Judge*.**

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* The Clerk of Court is directed to amend the official caption in this case to conform to the listing of the parties above.

OPINION

Per Curiam:

Petitioner-appellant Schaghticoke Tribal Nation (the "Schaghticoke") appeals from an August 27, 2008 judgment of the United States District Court for the District of Connecticut (Peter C. Dorsey, *Judge*) entered after the District Court granted summary judgment to respondents and intervenor-respondents. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389 (D. Conn. 2008).

In 2005, James E. Cason, Associate Deputy Secretary of the Department of the Interior, issued a Reconsidered Final Determination that declined to "acknowledg[e]" the "tribal existence" of the Schaghticoke. *See* 25 C.F.R. § 83.2. The Schaghticoke brought this petition to challenge the Reconsidered Final Determination under the Administrative Procedure Act, 5 U.S.C. § 702. The parties cross-moved for summary judgment, and the District Court concluded that the Reconsidered Final Determination was not arbitrary or capricious under 5 U.S.C. § 706. *Schaghticoke*, 587 F. Supp. 2d at 412-18. The District Court also rejected the Schaghticoke's contentions that the Reconsidered Final Determination was "the product of undue influence exerted by state and congressional political forces" and had been issued in violation of the Vacancies Reform Act, 5 U.S.C. §§ 3345-49d. *Schaghticoke*, 587 F. Supp. 2d at 402, 409-12, 418-21. The District Court therefore granted summary judgment to respondents and intervenor-respondents.

[**] The Honorable Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

On appeal, the Schaghticoke have abandoned their claim that the Reconsidered Final Determination was arbitrary or capricious. Instead, the Schaghticoke argue only that the Reconsidered Final Determination was the product of improper political influence and was issued in violation of the Vacancies Reform Act. Reviewing the District Court's grant of summary judgment *de novo, see, e.g., Sassaman v. Gamache*, 566 F.3d 307, 312 (2d Cir. 2009), we affirm.

I. Improper Political Influence

Although Connecticut political figures showed keen interest in whether the Department of the Interior acknowledged the Schaghticoke, the evidence submitted by the Schaghticoke cannot support a claim of improper political influence. "To support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute." *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984); *accord Chemung County v. Dole*, 804 F.2d 216, 222 (2d Cir. 1986).

Here, elected officials in Connecticut—including the state's Governor and Attorney General and members of the state's congressional delegation—met with and sent letters and emails to the Secretary of the Interior and other Interior Department officials expressing an adamant opposition to the Interior Department's potential acknowledgment of the Schaghticoke. *Schaghticoke*, 587 F. Supp. 2d at 402-05. In addition, House and Senate subcommittees held hearings at which members of Congress strongly criticized an interim decision by the Interior Department that favored acknowledgment, and a bill

was introduced in the House titled the "Schaghticoke Acknowledgment Repeal Act." *Id.* at 405-07.

Significantly, however, Interior Department officials uniformly testified in depositions that they were not influenced by the political clamor surrounding the Schaghticoke. *Id.* at 404-05, 411. Any political pressure, moreover, was exerted upon senior Interior Department officials; there is no evidence that any of the pressure was exerted upon Cason, a career employee of the Interior Department who was the official ultimately responsible for issuing the Reconsidered Final Determination. *See id.* at 407, 411. As a result, even if the Connecticut elected officials "intended to" influence the Reconsidered Final Determination, there is no evidence that they "*did* cause the agency's action to be influenced by factors not relevant under the controlling statute." *Orangetown*, 740 F.2d at 188 (emphasis added). We therefore affirm the District Court's conclusion that the Schaghticoke's evidence did not support a claim of improper political influence.[1]

II. Vacancies Reform Act

We also affirm the District Court's conclusion that the Reconsidered Final Determination did not violate the Vacancies Reform Act, 5 U.S.C. §§ 3345-49d. Interior Department regulations provide that Indian acknowledgment decisions are to be made by "the Assistant Secretary-Indian Affairs, or that officer's authorized representative." *See* 25 C.F.R. § 83.1

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[1] Our standard for a claim of "improper political influence" is clear, *see Orangetown*, 740 F.2d at 188; *Chemung County*, 804 F.2d at 222, and we reject the Schaghticoke's argument that we should apply a broader "appearance of bias" standard in this action.

(defining the term "Assistant Secretary" to include "the Assistant Secretary-Indian Affairs, or that officer's authorized representative"); *id.* § 83.10(l)(2) (providing that the "Assistant Secretary shall make a final determination regarding the petitioner's status"). In February 2005, the Assistant Secretary-Indian Affairs resigned. Ordinarily, when an "officer" such as the Assistant Secretary resigns, his or her duties are assumed by "the first assistant to the office," which in this case was the Principal Deputy Assistant Secretary-Indian Affairs. *See* 5 U.S.C. § 3345(a)(1). In February 2005, however, the Principal Deputy position was vacant, and thus the Secretary of the Interior temporarily appointed Cason, the Associate Deputy Secretary, to perform the Indian acknowledgment duties of the Assistant Secretary-Indian Affairs. It was in that capacity that Cason issued the Reconsidered Final Determination declining to acknowledge the Schaghticoke.

The Schaghticoke claim that the Final Reconsidered Determination was invalid because Cason was barred by statute from performing the duties of the Assistant Secretary-Indian Affairs. When an officer resigns and the "first assistant" position is vacant, the Vacancies Reform Act provides that "only the head of [the] Executive agency may perform any function or duty," *id.* § 3348(b)(2), "required by statute," *id.* § 3348(a)(2)(A)(ii), "or . . . regulation to be performed by the [resigning] officer," *id.* § 3348(a)(2)(B)(i)(II); *see also id.* § 3348(d)(1) (providing that any action taken in violation of the Vacancies Reform Act "shall have no force or effect"). According to the Schaghticoke, therefore, only the Secretary of the Interior was authorized by the Vacancies Reform Act to make Indian acknowledgment determinations

until a new Assistant Secretary-Indian Affairs took office.

The Schaghticoke's argument fails because Indian acknowledgment decisions may be made *either* by the "Assistant Secretary-Indian Affairs" *or* by his or her "authorized representative." 25 C.F.R. §§ 83.1, 83.10(l)(2). Just as an Assistant Secretary, in the ordinary course, may name an "authorized representative" to make Indian acknowledgment decisions, the Secretary of the Interior in February 2005, performing the Assistant Secretary's duties, simply named an "authorized representative"—Cason—to decide whether to acknowledge the Schaghticoke.

Put differently, the Vacancies Reform Act mandated that the Secretary of the Interior perform only those functions or duties of the Assistant Secretary that were "required by statute," 5 U.S.C. § 3348(a)(2)(A)(ii), "or . . . regulation to be performed by the [Assistant Secretary]," *id.* § 3348(a)(2)(B)(i)(II). Indian acknowledgment decisions did not fall within that category because they could be made *either* by the Assistant Secretary *or* by his or her "authorized representative." 25 C.F.R. §§ 83.1, 83.10(l)(2). Thus, the Vacancies Reform Act did not prohibit the Secretary of the Interior from designating Cason as the "authorized representative" in charge of Indian acknowledgment.

Accordingly, we affirm the District Court's conclusion that the Reconsidered Final Determination did not violate the Vacancies Reform Act.

CONCLUSION

For the reasons stated above, the August 27, 2008 judgment of the District Court is AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 2009

Docket No. 08-4735-cv

SCHAGHTICOKE TRIBAL NATION,
Petitioner-Appellant,

v.

DIRK KEMPTHORNE, SECRETARY, DEPARTMENT OF THE INTERIOR, JAMES E. CASON, ASSOCIATE DEPUTY SECRETARY, DEPARTMENT OF THE INTERIOR, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, AND INTERIOR BOARD OF INDIAN APPEALS,
Respondents-Appellees,

THE KENT SCHOOL CORPORATION, STATE OF CONNECTICUT, TOWN OF KENT, AND THE CONNECTICUT LIGHT AND POWER COMPANY,
Intervenors-Respndents-Appellees.[*]

Argued: October 8, 2009
Decided: October 19, 2009
Amended: November 4, 2009

Before: MINER and CABRANES, *Circuit Judges*, and KORMAN, *District Judge*.[**]

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[*] The Clerk of Court is directed to amend the official caption in this case to conform to the listing of the parties above.

Appeal from a judgment of the United States District Court for the District of Connecticut (Peter C. Dorsey, *Judge*). Petitioner-appellant Schaghticoke Tribal Nation brought a petition under the Administrative Procedure Act, 5 U.S.C. § 702, challenging the Department of the Interior's determination not to "acknowledge[e]" the "tribal existence" of the Schaghticoke Tribal Nation pursuant to 25 C.F.R. § 83.2. We affirm the District Court's grant of summary judgment to respondents-appellees and intervenor-appellees on the grounds that (1) the evidence presented by the Schaghticoke was insufficient to raise a claim of "improper political influence" under the standard set forth *in Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984), and (2) the Department of the Interior's determination did not violate the Vacancies Reform Act, 5 U.S.C. §§ 3345-49d.

Affirmed.

RICHARD EMANUEL, Branford, CT (David K. Jaffe, Brown Paindiris & Scott, P.C., Hartford, CT, *on the brief*),*for petitioner-appellant.*

JOHN B. HUGHES, Assistant United States Attorney, District of Connecticut (Nora R. Dannehy, Acting United States Attorney, District of Connecticut, and William J. Nardini, Assistant United States Attorney, *on the brief*), *for defendants-appellees.*

MARK F. KOHLER, Assistant Attorney General (Richard Blumenthal, Attorney General, and

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** The Honorable Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

Susan Quinn Cobb and Robert J. Deichert, Assistant Attorneys General, *on the brief*), Office of the Attorney General, Hartford, CT, *for intervenors-respondents-appellees.*

PER CURIAM:

Petitioner-appellant Schaghticoke Tribal Nation (the "Schaghticoke") appeals from an August 27, 2008 judgment of the United States District Court for the District of Connecticut (Peter C. Dorsey, *Judge*) entered after the District Court granted summary judgment to respondents and intervenor-respondents. *Schaghticoke Tribal Nation v. Kevthorne*, 587 F. Supp. 2d 389 (D. Conn. 2008).

In 2005, James E. Cason, Associate Deputy Secretary of the Department of the Interior, issued a Reconsidered Final Determination that declined to "acknowledg[e]" the "tribal existence" of the Schaghticoke. *See* 25 C.F.R. § 83.2. The Schaghticoke brought this petition to challenge the Reconsidered Final Determination under the Administrative Procedure Act, 5 U.S.C. § 702. The parties cross-moved for summary judgment, and the District Court concluded that the Reconsidered Final Determination was not arbitrary or capricious under 5 U.S.C. 5 § 706. *Schaghticoke*, 587 F. Supp. 2d at 412-18. The District Court also rejected the Schaghticoke's contentions that the Reconsidered Final Determination was "the product of undue influence exerted by state and congressional political forces" and had been issued in violation of the Vacancies Reform Act, 5 U.S.C. §§ 3345-49d. *Schaghticoke*, 587 F. Supp. 2d at 402, 409-12, 418-21. The District Court therefore granted summary judgment to respondents and intervenor-respondents.

On appeal, the Schaghticoke have abandoned their claim that the Reconsidered Final Determination was arbitrary or capricious. Instead, the Schaghticoke

argue only that the Reconsidered Final Determination was the product of improper political influence and was issued in violation of the Vacancies Reform Act. Reviewing the District Court's grant of summary judgment *de novo, see, e.g.*, *Sassaman v. Gamache*, 566 F.3d 307, 312 (2d Cir. 2009), we affirm.

I. Improper Political Influence

Although Connecticut political figures showed keen interest in whether the Department of the Interior acknowledged the Schaghticoke, the evidence submitted by the Schaghticoke cannot support a claim of improper political influence. "To support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute." *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984); *accord Chemung County v. Dole*, 804 F.2d 216, 222 (2d Cir. 1986).

Here, elected officials in Connecticut—including the state's Governor and Attorney General and members of the state's congressional delegation—met with and sent letters and emails to the Secretary of the Interior and other Interior Department officials expressing an adamant opposition to the Interior Department's potential acknowledgment of the Schaghticoke. *Schaghticoke*, 587 F. Supp. 2d at 402-05. In addition, House and Senate subcommittees held hearings at which members of Congress strongly criticized an interim decision by the Interior Department that favored acknowledgment, and a bill was introduced

in the House titled the "Schaghticoke Acknowledgment Repeal Act." *Id.* at 405-07.

Significantly, however, Interior Department officials uniformly testified in depositions that they were not influenced by the political clamor surrounding the Schaghticoke. *Id.* at 404-05, 411. Any political pressure, moreover, was exerted upon senior Interior Department officials; there is no evidence that any of the pressure was exerted upon Cason, who was the official ultimately responsible for issuing the Reconsidered Final Determination. *See id.* at 407, 411. As a result, even if the Connecticut elected officials "intended to" influence the Reconsidered Final Determination, there is no evidence that they "*did* cause the agency's action to be influenced by factors not relevant under the controlling statute." *Orangetown*, 740 F.2d at 188 (emphasis added). We therefore affirm the District Court's conclusion that the Schaghticoke's evidence did not support a claim of improper political influence.[1]

II. Vacancies Reform Act

We also affirm the District Court's conclusion that the Reconsidered Final Determination did not violate the Vacancies Reform Act, 5 U.S.C. §§ 3345-49d. Interior Department regulations provide that Indian acknowledgment decisions are to be made by "the Assistant Secretary—Indian Affairs, or that officer's authorized representative." *See* 25 C.F.R. § 83.1 (defining the term "Assistant Secretary" to include

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[1] Our standard for a claim of "improper political influence" is clear, *see Orangetown*, 740 F.2d at 188; *Chemung County*, 804 F.2d at 222, and we reject the Schaghticoke's argument that we should apply a broader "appearance of bias" standard in this action.

"the Assistant Secretary—Indian Affairs, or that officer's authorized representative"); *id.* § 83.10(*l*)(2) (providing that the "Assistant Secretary shall make a final determination regarding the petitioner's status"). In February 2005, the Assistant Secretary—Indian Affairs resigned. Ordinarily, when an "officer" such as the Assistant Secretary resigns, his or her duties are assumed by "the first assistant to the office," which in this case was the Principal Deputy Assistant Secretary—Indian Affairs. *See* 5 U.S.C. § 3345 (a)(1). In February 2005, however, the Principal Deputy position was vacant, and thus the Secretary of the Interior delegated to Cason, the Associate Deputy Secretary, the Indian acknowledgment duties of the Assistant Secretary—Indian Affairs. It was in that capacity that Cason issued the Reconsidered Final Determination declining to acknowledge the Schaghticoke.

The Schaghthcoke claim that the Final Reconsidered Determination was invalid because Cason was barred by statute from performing the duties of the Assistant Secretary—Indian Affairs. When an officer resigns and the "first assistant" position is vacant, the Vacancies Reform Act provides that "only the head of [the] Executive agency may perform any function or duty," *id.* § 3348(b)(2), "required by statute," *id.* § 3348(a)(2)(A)(ii), "or . . . regulation to be performed by the [resigning] officer," *id.* § 3348(a)(2)(B)(i)(II); *see also id.* § 3348(d)(1) (providing that any action taken in violation of the Vacancies Reform Act "shall have no force or effect"). According to the Schaghticoke, therefore, only the Secretary of the Interior was authorized by the Vacancies Reform Act to make

Indian acknowledgment determinations until a new Assistant Secretary—Indian Affairs took office.

The Schaghticoke's argument fails because Indian acknowledgment decisions may be made *either* by the "Assistant Secretary—Indian Affairs" *or* by his or her "authorized representative." 25 C.F.R. §§ 83.1, 83.10 (*l*)(2). Just as an Assistant Secretary, in the ordinary course, may name an "authorized representative" to make Indian acknowledgment decisions, the Secretary of the Interior in February 2005, performing the Assistant Secretary's duties, simply named an "authorized representative"—Cason—to decide whether to acknowledge the Schaghticoke.

Put differently, the Vacancies Reform Act mandated that the Secretary of the Interior perform only those functions or duties of the Assistant Secretary that were "required by statute," 5 U.S.C. § 3348(a)(2)(A)(ii), "or . . . regulation to be performed by the [Assistant Secretary]," *id.* § 3348(a)(2)(B)(i)(II). Indian acknowledgment decisions did not fall within that category because they could be made *either* by the Assistant Secretary *or* by his or her "authorized representative." 25 C.F.R. §§ 83.1, 83.10(*l*)(2). Thus, the Vacancies Reform Act did not prohibit the Secretary of the Interior from designating Cason as the "authorized representative" in charge of Indian acknowledgment.

Accordingly, we affirm the District Court's conclusion that the Reconsidered Final Determination did not violate the Vacancies Reform Act.

CONCLUSION

For the reasons stated above, the August 27, 2008 judgment of the District Court is AFFIRMED.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

08-4735cv

SCHAGHTICOKE TRIBAL NATION,
Petitioner-Appellant,

v.

DIRK KEMPTHORNE, Secretary, Department of the Interior, JAMES E. CASON, Associate Deputy Secretary, Department of the Interior, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, and INTERIOR BOARD OF INDIAN APPEALS,
Respondents-Appellees,

THE KENT SCHOOL CORPORATION, STATE OF CONNECTICUT, TOWN OR KENT, and THE CONNECTICUT LIGHT AND POWER COMPANY,
Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT (NEW HAVEN)

SCHAGHTICOKE TRIBAL NATION'S COMBINED PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING *EN BANC*

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PETITION FOR PANEL REHEARING

Pursuant to Rule 40, Fed. R. App. P., the Petitioner-Appellant, Schaghticoke Tribal Nation, petitions for rehearing of the appeal in *Schaghticoke Tribal Nation v. Kempthorne*, __ F.3d __ ("*Schaghticoke II*"). A copy of the panel's Nov. 4, 2009, amended opinion is attached to this combined petition.

"[T]he petitioner believes the court has overlooked or misapprehended" a "point of . . . fact"; Rule 40(a), Fed. R. App. Pro.; that is highly material to the resolution of Petitioner's "political influence" claim. The factual error appears in the following sentence of the amended opinion:

> Any political pressure, moreover, was exerted upon *senior* Interior Department officials; there is no evidence that any of the pressure was exerted upon [James E.] Cason who was the official ultimately responsible for issuing the Reconsidered Final Determination.

(Emphasis added.) *Schaghticoke II*, *supra*, slip op., at 4.

The point that has been "overlooked or misapprehended" is Cason's status within the Department. The opinion states that any political pressure "was exerted upon *senior* Interior Department officials"; (Emphasis added.) *Schaghticoke II*, slip op., at 4; thereby implying that Cason was *not* a senior official. That implication is refuted by the record. The Department's own lawyers described Cason's position of Associate Deputy Secretary as "[t]he *most senior* staff position" in the Department. (Emphasis added.) Br. for Resp.-App., at 71. In addition, former Secretary of the Interior Gale A. Norton, who appointed Cason to the Associate Deputy Secretary position,

described him as being part of her "leadership team."[1] Deposition of Gale A. Norton, at JA991-992, JA1018-19. *See also*, JA1837-39 (magazine article describing Cason as "essentially the department's *third in command*.") (Emphasis added.).

Since the panel's conclusion rested upon a misunderstanding of Cason's status in the Department's hierarchy, the Schaghticoke Tribal Nation requests rehearing of the appeal. The Tribe also requests that the opinion be amended.[2]

Respectfully Submitted,

SCHAGHTICOKE TRIBAL NATION
Petitioner-Appellant

BY: /s/ Richard Emanuel

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[1] As part of the leadership team, Cason knew that Norton—who had participated in policy decisions relating to the *positive* Final Determination (FD) for the Schaghticoke, *see* JA955, 958, 960, and who "knew that that [positive FD] was a decision reached on its merits," JA960—had *subsequently* been threatened by Rep. Frank R. Wolf at a meeting with three other members of the Connecticut Congressional delegation. *See* JA992, JA1017.

[2] The amended opinion properly deleted the phrase "a career employee of the Interior Department," between the words "Cason" and "who" in the quoted sentence. The record confirms that Cason was a political appointee; in fact, he was appointed *by Norton*. *See, e.g.*, JA1 326 (Department press release announcing Norton's appointment of Cason); *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 419 (D. Conn. 2008) (Dorsey, J.). In the interests of fairness, accuracy and completeness, Petitioner respectfully suggests that the panel amend the amended opinion to reflect that Cason was in fact a political appointee of Norton's.

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PETITION FOR REHEARING *EN BANC*

The Petitioner-Appellant, Schaghticoke Tribal Nation, respectfully requests rehearing *en banc* of the appeal in *Schaghticoke Tribal Nation v. Kempthorne*, __ F.3d __ (Oct. 19, 2009, amended Nov. 4, 2009) (Cabranes and Miner, *Circuit Judges*, and Korman, *District Judge*) (per curiam) ("*Schaghticoke II*"), because the proceeding involves a question "of exceptional importance." Rule 35(b)(1)(B), Fed. R. App. P. The question is whether the "political influence" standard of *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2nd Cir. 1984)—which, prior to this case, had *only* been applied to *non*-adjudicative agency proceedings—provides adequate due process protection for litigants seeking to raise claims based on the "appearance of bias" or impropriety at federal *adjudicative* agency proceedings.

I. Introduction and Background

"The Schaghticoke are a state-recognized tribe of Indians who possess a state-recognized reservation in Kent." *Schaghticoke Tribal Nation v. Harrison*, 264 Conn. 829, 831, 826 A.2d 1102 (2003). The Connecticut Colony first reserved land for the Tribe's use in 1736, *see* JA846, and Connecticut recognizes the Tribe as one of five "indigenous tribes" that are "self-governing entities possessing powers and duties over tribal members and reservations." Conn. Gen. Stat. § 47-59a(b).

Despite the long pedigree of *state* recognition, the current appeal is the culmination of the Tribe's 28-year quest for *federal* "acknowledgment." As District Court Judge Peter C. Dorsey noted in the opening line of his Ruling on Cross-Motions for Summary Judgment, the question of whether the Schaghticoke

Tribal Nation (STN) constitutes an Indian tribe under federal law is a "politically loaded question." *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp.2d 389, 394 (D. Conn. 2008) ("*Schaghticoke I*"), also at SPA-1.

The Tribe initiated the acknowledgment process in 1981 by filing a Letter of Intent under the regulations. *See* 25 C.F.R. Part 83. The imperative for seeking acknowledgment was *land*: the Tribe was a defendant in a 1985 case brought by the federal government seeking to condemn a portion of its reservation for use as part of the Appalachian Trail, and the Tribe was a plaintiff in land claim actions (filed in 1975, 1998, and 2000) seeking restoration of original reservation lands, under the Non-Intercourse Act, 25 U.S.C. §177. "Acknowledgment" was deemed essential in order for the Tribe to prosecute or defend the land claims.

The Tribe filed its first Documented Petition with the Bureau of Indian Affairs (BIA) in 1994, and six years later it was awaiting consideration. The 1985, 1998, and 2000 land claim actions had been assigned to Judge Dorsey, and were later consolidated. JA1508. Because of inordinate delays at the BIA, in 2000 Judge Dorsey assumed control of the acknowledgment process for the STN. He directed the parties and *amici* to develop a "Scheduling Order" that he approved on May 8, 2001. JA2258. The Scheduling Order established a framework for the BIA's determination of STN's petition, and prohibited *ex parte* communications between non-federal parties or *amici* and certain officials in the Department of the Interior.

The significance of the Scheduling Order is that *since May 8, 2001, the federal administrative process*

involving STN's petition for acknowledgment has been under the ultimate supervision and control of a federal judge—and all parties and amici have been participating in that process.

There was no political outcry when, on Dec. 5, 2002, the Office of Federal Acknowledgment (OFA) issued a Proposed Finding ("PF") recommending *against* acknowledging the STN. After the submission of comments and additional evidence, the OFA issued a Final Determination ("FD") on Jan. 29, 2004, *acknowledging* STN as an Indian tribe. *See* JA651. Within hours, state and federal politicians launched a political assault against the Tribe's acknowledgment. The Tribe's opponents were driven by fear that federal acknowledgment would enable the tribe to open a casino, under the authority of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, that had been enacted in 1988.

After several months of intensive political opposition, including the first of three Congressional hearings at which the STN FD was attacked, Connecticut and other parties filed requests for reconsideration of the FD with the Interior Board of Indian Appeals ("IBIA"). In May 2005, the IBIA vacated the FD and remanded it to the Assistant Secretary–Indian Affairs "for further work and reconsideration." JA901. That remand was based largely on the IBIA's limitation of the use of evidence of "state recognition" to satisfy the criteria for federal acknowledgment.

On Oct. 11, 2005, the OFA issued a Reconsidered Final Determination ("RFD"), declining to acknowledge the STN. *See* JA561. The STN then filed a Petition for Review in the District Court claiming, inter alia, that its due process rights had been violated by undue political influence. *See* JA1 59-64.

Although review of federal agency decisions is normally limited to the Administrative Record; which in this case "contains over 6,774 distinct documents" comprising 47,012 pages, see JA25 and JA1 07; Judge Dorsey permitted "extra-record" discovery because STN made a "strong showing," *Citizens to Preserve Overton Park*, 401 U.S. 402, 420 (1971), in support of its claim that improper political influences had been exerted on decision makers at the Interior Department. After granting some of STN's requests for discovery and depositions, but denying others (e.g., discovery of White House documents), Judge Dorsey decided the case on cross-motions for summary judgment. He denied STN's request for oral argument.

II. The "Political Influence" Claim: An Overview

Judge Dorsey summed up the political activities that commenced on the day the Tribe received its positive FD:

> There is *no dispute* that the majority of Connecticut's Congressional delegation, the Governor, the Attorney General, and other anti-gaming advocates in Washington *fiercely opposed* the FD's acknowledgment of STN.
>
> * * *
>
> There is *no question* that throughout 2004 and 2005 the Connecticut Congressional delegation, Connecticut state and local officials, and other public and private stakeholders, including a community organization in the Town of Kent which hired the Washington lobbying firm Barbour Griffith & Rogers (BGR) to advocate on its behalf, *lobbied the Secretary of the Interior, the BIA, the IBIA, the White House, and even this*

> *Court about reversing the acknowledgment decision.*
>
> * * *
>
> . . . STN's FD *became the focus* of House and Senate subcommittee hearings attended by DOI staff, members of Congress, AG Blumenthal, and others.
>
> * * *
>
> There is *no question* that *political actors exerted pressure* on the Department over the course of 2004 and 2005 in opposition to the FD's acknowledgment of STN, both *publicly* through Congressional hearings and media publicity and *privately* through meetings and correspondence with the Secretary and other agency officials.
>
> * * *
>
> There is *no question* that, as discussed above, various members of Congress as well as the Connecticut Governor and AG expressed their disapproval with the STN acknowledgment at the Congressional hearings on the subject, and the hearings became heated on at least one occasion.

(Emphases added.) *Schaghticoke I*, at 402-03, 405, 410-11; SPA-16-17, 21, 29, 31.

A few of the political events deserve special mention:

1. An investigation and a clean bill of health: From the moment the Tribe received the positive FD, politicians sought to discredit the Tribe and the BIA. Many politicians called for investigations, claiming the Tribe or BIA had engaged in "unlawful" or

"illegal" conduct. In response to Senator Christopher Dodd's request for an investigation, the Interior Department's Inspector General, Earl E. Davaney, conducted a comprehensive six-month investigation, and found that neither the Tribe nor the BIA had acted improperly. *See* JA1425-28.

2. The first *ex parte* violation: On March 17, 2004, Connecticut Attorney General Richard Blumenthal had a private discussion with Interior Secretary Gale A. Norton in Washington, D.C., and expressed his disagreement with the STN FD. Judge Dorsey found that the Attorney General's *ex parte* contact was "improper" and "inappropriate," and "threaten[ed] to subvert the integrity of the appeal process itself." JA1512; Br. of Pet.-App., at 23.

3. The Congressman's threat: On March 30, 2004, Secretary Norton was summoned to Capitol Hill to meet with Connecticut Representatives Christopher Shays, Nancy Johnson, and Rob Simmons. The meeting was held in the office of Rep. Frank R. Wolf from Virginia, a member of the House Appropriations Committee that has fiscal authority over the Department of the Interior. As Norton stated at her deposition, Rep. Wolf is "very opposed to gaming." JA989. The meeting in his office was "fairly emotional," and the Representatives were pressing her to overturn the STN FD. JA993. Norton testified that Wolf, who was angry, threatened her: "Congressman Wolf said *he would tell the President he thought I ought to be fired*."[3] (Emphasis added.) JA990-91, JA993, JA1014.

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[3] "A Member [of Congress] should not directly or indirectly threaten reprisal or promise favoritism or benefit to any administrative official." (Bold in original.) *House Ethics Manual*, Committee On Standards of Official Conduct, U.S. House of Rep.,

4. The "Repeal" bill: In March 2005, Rep. Nancy Johnson introduced the "Schaghticoke Acknowledgment Repeal Act of 2005." *See* JA1487-1507. The proposed legislation claimed that the STN FD was the result of "premeditated manipulation" of evidence and of the acknowledgment standards. It accused (by name), the Principal Deputy Assistant Secretary–Indian Affairs who had issued the STN FD, of participating in an "erroneous" and "unlawful" decision. JA1487-1507. Mr. R. Lee Fleming, Director of the OFA, and his staff were aware of this legislative attempt to repeal a decision made by OFA. JA1233. Fleming had not seen a "termination" bill during his tenure at OFA, *see*, JA1234. The bill did not become law, but it may have been viewed by OFA as a threat to its authority.[4]

5. Judge Dorsey's *ex parte* letter to Gov. Rell. On July 11, 2005, while the Tribe's petition was under reconsideration by the OFA, Connecticut Governor M. Jodi Rell wrote to Judge Dorsey, urging him not to

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110th Cong. 2d Session (2008), at 306. "Direct or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representative role." *Id.*, 307. The latter sentence was adopted in 1970. *Id.*, 356 57 (Advisory Opinion No. 1). *See also, Power Authority of New York v. FERC*, 743 F.2d 93, 110 (2nd Cir. 1984) ("[E]x parte communications by Congressmen or anyone else with a judicial or quasi-judicial body regarding a pending matter are improper and should be discouraged.").

[4] In the 1950s and 1960s, "Congress terminated its trust relationship with 109 tribes." Steven L. Pevar, *The Rights of Indians and Tribes* 11-12, 67 (N.Y.U. Press 2004). Termination "is the ultimate weapon of Congress and the ultimate fear of tribes." *Id.*, 68. The termination policy was repudiated by President Nixon in 1970. *See*, 116 Cong. Rec. S23258-23262 (July 8, 1970).

allow the Tribe to submit additional evidence. JA1459-60. That letter was made part of the record. On Aug. 19, 2005, Judge Dorsey wrote a *private* letter to the Governor, that stated in full:

> Dear Governor Rell:
>
> Thank you for your letter of July 11, 2005. Your *frustration and impatience is fully warranted*. A court-ordered deadline for concluding the administrative proceeding was intended to accommodate three considerations: 1. the tribe's right to due process; 2. the BIA's caseload; and 3. the lawsuit's parties right to a reasonably prompt resolution of the dispute (including the State's interest). The prolonged protraction of this matter, to resolve the question of tribal recognition, *no. 1 has stretched*, no. 2 has given the BIA more time than it deserves, and no. 3 has deprived the parties of a reasonably prompt resolution.
>
> I have, in accordance with the view of the U.S. Attorney's Office, allowed a slight extension for a request for technical assistance and information. This was *to avoid any claim of infringement of the Tribe's due process*. I recognize this does not accommodate no. 3 above nor the view of your letter. It is intended to be a last extension of time upon the expiration of which the cases will be decided. It reflects a caution *intended to avoid a reversal by another Court which might buy a due process argument*.

(Emphasis added.) JA1461. Judge Dorsey's letter to the Governor was discovered by the Tribe *one year later* as a result of a FOIA request to the Governor's office. Once discovered, the Tribe sought "clarification" about the letter from Judge Dorsey, as well as

supplemental discovery. JA70-74. Judge Dorsey maintained his letter had "no substantive significance" and did not reflect his views on the merits of STN's claims. JA88-89. At STN's request, the letter was made part of the record, but Judge Dorsey denied supplemental discovery about the letter. JA88-89.

The letter is improper: it is an *ex parte* communication with the Governor, an "interested party," *see* 25 C.F.R. § 83.1. As counsel acknowledged at oral argument before the panel, the letter does not furnish independent grounds for relief on appeal. However, it is emblematic of the political pressures and entanglements that have permeated this case—and which can lead even well-intentioned adjudicators and judges "not to hold the balance nice, clear, and true." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). The letter displays a sympathetic attitude toward the Governor, and a grudging attitude toward the Tribe's rights. It suggests that three years before he ruled on the Petition for Review, Judge Dorsey was calibrating *how much* due process was needed to "avoid a reversal" *in this Court*. Logically, such calculation presupposes the Tribe would be unsuccessful in the BIA, and in the District Court, and therefore would *need* to appeal. It is not difficult to see why *any* litigant in a politically charged case, might feel that such a letter contributes to the *appearance* that the "fix was in."

III. How the Political Influence Claim Was Decided

A. By the District Court: Judge Dorsey defined the critical question as "whether the evidence presented shows that the [political] pressure exerted can be deemed to have *actually influenced the decision maker who issued the RFD*. (Emphasis added.) *Schaghticoke I*, at 410; SPA-29. Citing cases from other

Circuits (but not citing *Town of Orangetown*, supra), he concluded *he* was not "persuade[d]" or "convince[d]"[5] that political activities "actually influenced" or "ultimately affected" the decision not to acknowledge the Tribe. *Schaghticoke I*, at 410-11; SPA-29, SPA-31-32. He observed that he had to "accept the evidence as presented at face value, in particular the testimony by the agency decision-makers that they were not unduly pressured by particular politicians or the political climate at large." *Schaghticoke I*, at 411-12; SPA-33.

The Tribe also claimed that the "appearance of bias" or impropriety could itself invalidate an agency's decision. Although Judge Dorsey briefly referred to an "appearance of bias" standard,[6] he never applied such a standard.

B. By the Panel: The panel applied the political influence standard adopted by a panel of this Court in 1984:

> "'To support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute." *Town of Orange-*

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[5] On appeal, Petitioner contended that the District Court misapplied the summary judgment standards, by improperly acting as a factfinder, rather than properly determining whether there was a "genuine issue as to any material" fact. See Pet. Br., at 79-82; Pet. Reply Br., at 29-32.

[6] Citing *D. C. Federation of Civic Associations et al. v. Volpe*, 459 F.2d 1231, 1246-47 (D.C.Cir. 1971), Judge Dorsey stated, "'the *appearance* of bias or pressure may be no less objectionable than the reality.'" (Emphasis added by Judge Dorsey). *Schaghticoke I*, at 409; SPA-28.

town v. Ruckelshaus, 740 F.2d 185, 188 (2nd Cir. 1984); *accord Chemung County v. Dole*, 804 F.2d 216, 222 (2nd Cir. 1986).

Schaghticoke II, slip op., at 3. The panel found that although Connecticut political figures had shown "keen interest" in and "express[ed] adamant opposition to" the STN acknowledgment, and members of Congress had "strongly criticized" the STN FD, "the evidence submitted by the Schaghticoke cannot support a claim of improper political influence." *Id.*, at 3-4. That conclusion was based primarily on the fact that "Department officials uniformly testified in depositions that they were not influenced by the political clamor surrounding the Schaghticoke." *Id.*, at 4.

The panel rejected Petitioner's "appearance of bias" claim in a footnote:

> Our standard for a claim of 'improper political influence' is clear, *see Orangetown*, 740 F.2d at 188; *Chemung County*, 804 F.2d at 222, and we reject the Schaghticoke's argument that we should apply a broader 'appearance of bias' standard in this action.

Schaghticoke II., slip op., at 4, n. 1.

IV. Why Rehearing *En Banc* is Warranted

As STN argued on appeal, the *Orangetown* rule was designed and configured for political influence claims arising from *non*-adjudicative federal agency decisions. The agency involved in *Orangetown* "was not performing an adjudicatory function," but only "an administrative one dealing with the disbursement of grant funds." *Id.*, 188. And in *Chemung County*, *supra*—the only other decision of this Court

applying *Orangetown*—the agency action under review was not adjudicative. Finally, neither of the two cases cited in *Orangetown*, at 188, as authority for the announced rule, involved adjudicative-type decisions.[7]

Judge Dorsey correctly noted that "[t]he BIA's federal acknowledgment process is an *adjudicative* process." (Emphasis added.) *Schaghticoke I*, at 409; SPA-28. Prior to this case, *Orangetown* had *never* been applied by this Court, or any other, to a political influence claim arising from an adjudicative proceeding.[8]

A panel of this Circuit ordinarily is bound by the decision of a prior panel. *See Bank-Boston, N.A. v. Sokolowski*, 205 F.3d 532, 534-35 (2nd Cir. 2000). Thus, *en banc* review would be necessary for the Court to decide if *Orangetown*'s "one size fits all" rule should be modified to distinguish between adjudicative ("quasi-judicial") and rulemaking ("quasi-legislative") proceedings. Such a distinction has been expressly or implicitly recognized by the First,[9]

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[7] *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), involved informal rulemaking for emissions standards, and *Natural Resources Defense Council v. City of New York*, 534 F. Supp. 279 (S.D.N.Y.), *aff'd*, 672 F.2d 292 (2nd Cir.), *cert. dismissed*, 456 U.S. 920 (1982), involved building permits.

[8] *Orangetown* was cited by the Sixth Circuit in an administrative *rulemaking* (non-adjudicative) case. *See, Radio Association on Defending Airwave Rights, Inc. v. United States Department off Transportation*, 47 F.3d 794, 807 (6th Cir), *cert. denied*, 516 U.S. 811 (1995).

[9] *Esso Standard Oil Co. (Puerto Rico) v. Lopez-Freytes*, 522 F.3d 136, 145-148 (1st Cir. 2008) (addressing claims of appearance of bias and actual bias).

Third,[10] Fifth,[11] Seventh,[12] Ninth,[13] Eleventh,[14] and District of Columbia Circuits.[15] It appears that no

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[10] *Gulf Oil Corporation v. Federal Power Commission*, 563 F.2d 588, 610-12 (3rd Cir. 1977) ("administrative agencies must be allowed to exercise their adjudicative functions free of Congressional pressure"), *cert. denied*, 434 U.S. 1062 (1978).

[11] *Pillsbury Co. v. Federal Trade Commission*, 354 F.2d 952, 964 (5th Cir. 1966) (when Congress intervenes in an agency's judicial function, courts become concerned not only with litigant's right to a fair trial, but "equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences"); *DCP Farms, et al. v. Yeutter*, 957 F.2d 1183, 1187-88 (5th Cir.) ("Pillsbury holds that the appearance of bias caused by congressional interference violates the due process rights of parties involved in *judicial* or *quasi-judicial* agency proceedings.") (Emphasis in original.), *cert. denied*, 506 U.S. 953 (1992).

[12] *Monieson v. Commodity Futures Trading Commission*, 996 F.2d 852, 865 (7th Cir. 1993) (noting distinction between congressional intervention in legislative or judicial functions).

[13] *State ex rel. State Water Resources Control Board v. Federal Energy Regulatory Commission*, 966 F.2d 1541, 1551-52 (9th Cir. 1992) (Congressman's letters to FERC "do not rise to the level of undue congressional influence described in Pillsbury, nor do they adversely affect the appearance of impartiality in this case") (Emphasis added.); *Portland Audubon Society v. The Endangered Species Committee*, 984 F.2d 1534, 1539-47 (9th Cir. 1993) (amended opinion) (even "the President may not interfere with quasi-adjudicatory agency actions").

[14] *Fund for Animals, Inc., v. Rice*, 85 F.3d 535, 548 (11th Cir. 1996) ("'congressional input neither created an appearance of impropriety nor actually affected the outcome'") (Emphasis added.).

[15] *D.C. Federation of Civic Associations et al. v. Volpe*, 459 F.2d 1231, 1246-47 (D.C. Cir. 1971) (if Secretary of Transportation had been acting in judicial or quasi-judicial capacity, "plaintiffs might have *prevailed even without showing that the pressure had actually influenced* the Secretary's decision. With

other Circuit applies an *Orangetown*-type rule "across the board."

CONCLUSION

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A. T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2259 (2009). That principle "applies to administrative agencies which adjudicate as well as to courts," *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975), and "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954); *United States v. Edwardo-Franco*, 885 F.2d 1002, 1005 (2nd Cir. 1989) (same).

For the foregoing reasons, Petitioner respectfully urges this Court to rehear the appeal *en banc*.

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regard to judicial decision making, whether by court or agency, the *appearance of bias or pressure may be no less objectionable than the reality.*") (Emphasis added.), *cert. denied*, 405 U.S. 1030 (1972); *Peter Kiewit Sons' Co. v. United States Army Corps of Engineers, et al.*, 714 F.2d 163, 169 (D.C. Cir. 1983) ("The [*Volpe*] court indicated that if the decision had been judicial or quasi-judicial, it could be invalidated by 'the appearance of bias or pressure.' Under this standard, pressure on the decision-maker alone, without proof of effect on the outcome, is sufficient to vacate a decision."); *ATX, Inc. v. United States Department off Transportation*, 41 F.3d 1522, 1527-29 (D.C. Cir. 1994) 1527-29 (where a proceeding is quasi-judicial, "we must determine whether congressional interference occurred, *or appeared to*, to such an extent as to compromise the administrative process") (Emphasis added.); *Koniag, Inc., The Village of Uyak v. Andrus*, 580 F.2d 601, 610 (D.C. Cir.) (Congressional letter to Interior Secretary "compromised *the appearance of the Secretary's impartiality*") (Emphasis added.), *cert. denied*, 439 U.S. 1052 (1978). *See also, Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority*, 672 F.2d 109, 113 (D.C. Cir. 1982) (*ex parte* contacts).

Respectfully Submitted,

SCHAGHTICOKE TRIBAL NATION
Petitioner-Appellant

BY: /s/ Richard Emanuel

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel certifies that this combined petition for rehearing and petition for rehearing *en banc* complies with the page limitation of fifteen (15) pages, as provided by Fed. R. App. P. 35(b)(2) and 35(b)(3), and Fed. R. App. P. 40(b).

Pursuant to Fed. R. App. P. 32(a)(5) and 32(a)(6), the undersigned counsel further certifies that this combined petition complies with typeface and type style requirements, because this petition has been prepared in proportionally-spaced typeface using Microsoft Word software with Times New Roman 14-point font.

/s/ Richard Emanuel
RICHARD EMANUEL
Counsel for Petitioner-Appellant

ANTI-VIRUS CERTIFICATION

Pursuant to Second Circuit Local Rule 32(a)(1)(E), I, Richard Emanuel, hereby certify that I scanned the Portable Document Format (PDF) version of the Combined Petition for Panel Rehearing and Petition for Rehearing *En Banc*, for viruses, and no viruses have been detected. The name and version of the anti-virus detector that I used, is Symantec Anti-Virus, Program 10.2.0.333, Version Nov. 13, 2009, rev. 3.

/s/ Richard Emanuel
RICHARD EMANUEL
Counsel for Petitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of November, 2009, copies of the attached combined petition for panel rehearing and petition for rehearing *en banc*, were sent by first class mail, postage prepaid, to all counsel of record, as follows:

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/s/ Richard Emanuel
Richard Emanuel
Counsel for Petitioner-Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2009

Docket No. 08-4735-cv

SCHAGHTICOKE TRIBAL NATION,
Petitioner-Appellant,

v.

DIRK KEMPTHORNE, Secretary, Department of the Interior, JAMES E. CASON, Associate Deputy Secretary, Department of the Interior, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, and INTERIOR BOARD OF INDIAN APPEALS,
Respondents-Appellees,

THE KENT SCHOOL CORPORATION, STATE OF CONNECTICUT, TOWN OF KENT, and THE CONNECTICUT LIGHT AND POWER COMPANY,
Intervenors-Respondents-Appellees.[*]

(Argued: October 8, 2009
Decided: October 19, 2009
Amended: November 4, 2009)

Before: MINER and CABRANES, *Circuit Judges*, and KORMAN, *District Judge*.[**]

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[*] The Clerk of Court is directed to amend the official caption in this case to conform to the listing of the parties above.

Appeal from a judgment of the United States District Court for the District of Connecticut (Peter C. Dorsey, *Judge*). Petitioner-appellant Schaghticoke Tribal Nation brought a petition under the Administrative Procedure Act, 5 U.S.C. § 702, challenging the Department of the Interior's determination not to "acknowledg[e]" the "tribal existence" of the Schaghticoke Tribal Nation pursuant to 25 C.F.R. § 83.2. We affirm the District Court's grant of summary judgment to respondents-appellees and intervenor-appellees on the grounds that (1) the evidence presented by the Schaghticoke was insufficient to raise a claim of "improper political influence" under the standard set forth in *Town of Orangetown v. Buckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984), and (2) the Department of the Interior's determination did not violate the Vacancies Reform Act, 5 U.S.C. §§ 3345-49d.

Affirmed.

RICHARD EMANUEL, Branford, CT (David K. Jaffe, Brown Paindiris & Scott, P.C., Hartford, CT, *on the brief*), *for petitioner-appellant*.

JOHN B. HUGHES, Assistant United States Attorney, District of Connecticut (Nora R. Dannehy, Acting United States Attorney, District of Connecticut, and William J. Nardini, Assistant United States Attorney, *on the brief*), *for defendants-appellees*.

** The Honorable Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

MARK F. KOHLER, Assistant Attorney General (Richard Blumenthal, Attorney General, and Susan Quinn Cobb and Robert J. Deichert, Assistant Attorneys General, *on the brief*), Office of the Attorney General, Hartford, CT, *for intervenors-respondents-appellees*.

PER CURIAM:

Petitioner-appellant Schaghticoke Tribal Nation (the "Schaghticoke") appeals from an August 27, 2008 judgment of the United States District Court for the District of Connecticut (Peter C. Dorsey, *Judge*) entered after the District Court granted summary judgment to respondents and intervenor-respondents. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389 (D. Conn. 2008).

In 2005, James E. Cason, Associate Deputy Secretary of the Department of the Interior, issued a Reconsidered Final Determination that declined to "acknowledg[e]" the "tribal existence" of the Schaghticoke. *See* 25 C.F.R. § 83.2. The Schaghticoke brought this petition to challenge the Reconsidered Final Determination under the Administrative Procedure Act, 5 U.S.C. § 702. The parties cross-moved for summary judgment, and the District Court concluded that the Reconsidered Final Determination was not arbitrary or capricious under 5 U.S.C. § 706. *Schaghticoke*, 587 F. Supp. 2d at 412-18. The District Court also rejected the Schaghticoke's contentions that the Reconsidered Final Determination was "the product of undue influence exerted by state and congressional political forces" and had been issued in violation of the Vacancies Reform Act, 5 U.S.C. §§ 3345-49d.

Schaghticoke, 587 F. Supp. 2d at 402, 409-12, 418-21. The District Court therefore granted summary judgment to respondents and intervenor-respondents.

On appeal, the Schaghticoke have abandoned their claim that the Reconsidered Final Determination was arbitrary or capricious. Instead, the Schaghticoke argue only that the Reconsidered Final Determination was the product of improper political influence and was issued in violation of the Vacancies Reform Act. Reviewing the District Court's grant of summary judgment *de novo*, *see, e.g.*, *Sassaman v. Gamache*, 566 F.3d 307, 312 (2d Cir. 2009), we affirm.

I. Improper Political Influence

Although Connecticut political figures showed keen interest in whether the Department of the Interior acknowledged the Schaghticoke, the evidence submitted by the Schaghticoke cannot support a claim of improper political influence. "To support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute." *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984); *accord Chemung County v. Dole*, 804 F.2d 216, 222 (2d Cir. 1986).

Here, elected officials in Connecticut—including the state's Governor and Attorney General and members of the state's congressional delegation—met with and sent letters and emails to the

Secretary of the Interior and other Interior Department officials expressing an adamant opposition to the Interior Department's potential acknowledgment of the Schaghticoke. *Schagpticoke*, 587 F. Supp. 2d at

402-05. In addition, House and Senate subcommittees held hearings at which members of Congress strongly criticized an interim decision by the Interior Department that favored acknowledgment, and a bill was introduced in the House titled the "Schaghticoke Acknowledgment Repeal Act." *Id.* at 405-07.

Significantly, however, Interior Department officials uniformly testified in depositions that they were not influenced by the political clamor surrounding the Schaghticoke. *Id.* at 404-05, 411. Any political pressure, moreover, was exerted upon senior Interior Department officials; there is no evidence that any of the pressure was exerted upon Cason, who was the official ultimately responsible for issuing the Reconsidered Final Determination. *See id.* at 407, 411. As a result, even if the Connecticut elected officials "intended to" influence the Reconsidered Final Determination, there is no evidence that they "*did* cause the agency's action to be influenced by factors not relevant under the controlling statute." *Orangetoson*, 740 F.2d at 188 (emphasis added). We therefore affirm the District Court's conclusion that the Schaghticoke's evidence did not support a claim of improper political influence.[1]

II. Vacancies Reform Act

We also affirm the District Court's conclusion that the Reconsidered Final Determination did not violate the Vacancies Reform Act, 5 U.S.C. §§ 3345-49d. Interior Department regulations provide that Indian acknowledgment decisions are to be made by "the

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[1] Our standard for a claim of "improper political influence" is clear, *see Orangetown*, 740 F.2d at 188; *Chemung County*, 804 F.2d at 222, and we reject the Schaghticoke's argument that we should apply a broader "appearance of bias" standard in this action.

Assistant Secretary–Indian Affairs, or that officer's authorized representative." *See* 25 C.F.R. § 83.1 (defining the term "Assistant Secretary" to include "the Assistant Secretary–Indian Affairs, or that officer's authorized representative"); *id.* § 83.10(*l*)(2) (providing that the "Assistant Secretary shall make a final determination regarding the petitioner's status"). In February 2005, the Assistant Secretary–Indian Affairs resigned. Ordinarily, when an "officer" such as the Assistant Secretary resigns, his or her duties are assumed by "the first assistant to the office," which in this case was the Principal Deputy Assistant Secretary–Indian Affairs. *See* 5 U.S.C. § 3345(a)(1). In February 2005, however, the Principal Deputy position was vacant, and thus the Secretary of the Interior delegated to Cason, the Associate Deputy Secretary, the Indian acknowledgment duties of the Assistant Secretary–Indian Affairs. It was in that capacity that Cason issued the Reconsidered Final Determination declining to acknowledge the Schaghticoke.

The Schaghticoke claim that the Final Reconsidered Determination was invalid because Cason was barred by statute from performing the duties of the Assistant Secretary–Indian Affairs. When an officer resigns and the "first assistant" position is vacant, the Vacancies Reform Act provides that "only the head of [the] Executive agency may perform any function or duty," *id.* § 3348(b)(2), "required by statute," *id.* § 3348(a)(2)(A)(ii), "or . . . regulation to be performed by the [resigning] officer," *id.* § 3348(a)(2)(B)(i)(II); *see also id.* § 3348(d)(1) (providing that any action taken in violation of the Vacancies Reform Act "shall have no force or effect"). According to the Schaghticoke, therefore, only the Secretary of the Interior was authorized by the

Vacancies Reform Act to make Indian acknowledgment determinations until a new Assistant Secretary–Indian Affairs took office.

The Schaghticoke's argument fails because Indian acknowledgment decisions may be made *either* by the "Assistant Secretary Indian Affairs" *or* by his or her "authorized representative." 25 C.F.R. §§ 83.1, 83.10(*l*)(2). Just as an Assistant Secretary, in the ordinary course, may name an "authorized representative" to make Indian acknowledgment decisions, the Secretary of the Interior in February 2005, performing the Assistant Secretary's duties, simply named an "authorized representative"—Cason—to decide whether to acknowledge the Schaghticoke.

Put differently, the Vacancies Reform Act mandated that the Secretary of the Interior perform only those functions or duties of the Assistant Secretary that were "required by statute," 5 U.S.C. § 3348(a)(2)(A)(ii), "or . . . regulation to be performed by the [Assistant Secretary]," *id.* § 3348(a)(2)(B)(i)(II). Indian acknowledgment decisions did not fall within that category because they could be made *either* by the Assistant Secretary *or* by his or her "authorized representative." 25 C.F.R. §§ 83.1, 83.10(*l*)(2). Thus, the Vacancies Reform Act did not prohibit the Secretary of the Interior from designating Cason as the "authorized representative" in charge of Indian acknowledgment.

Accordingly, we affirm the District Court's conclusion that the Reconsidered Final Determination did not violate the Vacancies Reform Act.

CONCLUSION

For the reasons stated above, the August 27, 2008 judgment of the District Court is AFFIRMED.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 08-4735-cv

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of Februry, two thousand ten.

SCHAGHTICOKE TRIBAL NATION,
Petitioner-Appellant,

v.

DIRK KEMPTHORNE, SECRETARY, DEPARTMENT OF THE INTERIOR, JAMES E. CASON, ASSOCIATE DEPUTY SECRETARY, DEPARTMENT OF THE INTERIOR, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, AND INTERIOR BOARD OF INDIAN APPEALS,
Respondents-Appellees,

THE KENT SCHOOL CORPORATION, STATE OF CONNECTICUT, TOWN OF KENT, AND THE CONNECTICUT LIGHT AND POWER COMPANY,
Intervenors-Respondents-Appellees.

Appellant Schaghticoke Tribal Nation having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel

rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe,
Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 08-4735-cv

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of March, two thousand and ten.

SCHAGHTICOKE TRIBAL NATION,
Plaintiff-Appellant,

v.

DIRK KEMPTHORNE, SEC. DEPT OF THE INTERIOR, JAMES E. CASON, ASSOC. DEPUTY SEC. DEPT OF THE INTERIOR, US DEPT. OF INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, INTERIOR BD OF INDIAN APPEALS,
Defendants-Appellees,

THE KENT SCHOOL CORPORATION, STATE OF CONNECTICUT, TOWN OF KENT, THE CONNECTICUT LIGHT AND POWER COMPANY,
Intervenor-Defendants-Appellees.

ORDER

Before: Roger J. Miner, José A. Cabranes, *Circuit Judges*, Edward R. Korman, *District Judge*.*

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* The Honorable Edward R. Korman of the United States District Court for the Eastern District of New York, sitting by designation.

IT IS HEREBY ORDERED that Appellant's motion to stay issuance of the mandate until May 25, 2010, is GRANTED,

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe,
Clerk

Judy Pisnanont,
Motions Staff Attorney

APPENDIX H

STATE OF CONNECTICUT
EXECUTIVE CHAMBERS

STATE CAPITOL, HARTFORD, CONNECTICUT 06106
TEL: (860) 566-4840 • FAX: (860) 524-7396
www.state.ct.us/governor

July 11, 2005

Honorable Peter C. Dorsey
Senior United States District Judge
141 Church Street
New Haven, CT 06510

Dear Judge Dorsey:

It has come to my attention that on June 29, 2005, the Bureau of Indian Affairs ("BIA"), through the Office of the United States Attorney, submitted an alternative Proposed Amended Order ("BIA Alternative Order") in response to a Motion to Amend Scheduling Order ("Schaghticoke Motion"), filed by the Schaghticoke Tribal Nation ("Schaghticoke"). As Governor of Connecticut, I urge you to deny the Schaghticoke Motion and to reject the BIA Alternative Order.

As I am certain you are aware, on May 12, 2005, the Interior Board of Indian Appeals vacated and remanded the final determination of the BIA that recognized the Schaghticoke as a federal tribe. Days after the MIA's decision, the DIA, in a letter ("BIA Letter"), stated "[u]nsolicited arguments, evidence, comments and briefings from the petitioners and interested parties will not be accepted or requested . . . [during the 120 reconsideration period for the remanded Schaghticoke final determination]."

The BIA Alternative Order, if accepted, would constitute a reversal of the bar on the submission of new evidence to the BIA contained in the BIA Letter and further suggests an additional 30 day extension for the issuance of the final determination on the Schaghticoke petition.

In what has become an all too common practice, the BIA has yet again reversed itself by suggesting that you accommodate the Schaghticoke by allowing the Tribe to submit new information that might demonstrate a higher rate of Indian-to-Indian marriages in the mid-19th century. This information is apparently needed as a result of the BIA's own revelation in 2004 that it used a flawed calculation method, which mistakenly overstated the percentage of Schaghticoke-to-Schaghticoke marriages during the 19th century. When calculated properly, the Schaghticoke intra-marriage rate fell to approximately 20 percent, far below the BIA's 50 percent recognition requirement.

Most galling is the BIA suggestion that you approve an extension for it to issue a final determination on this petition. This petition has been denied, awarded, vacated and remanded and it is time for a final resolution. In light of the time already spent by the BIA on this petition, there is no practical reason for granting the request for a 30 day continuance.

There is a point at which this runaway federal agency must be held to its word. This proposal to delay the issuance of a final determination and to re-open the process for more evidence must be rejected. The BIA can not be allowed to continually change its mind about policy and procedure in cases with as much impact on states as those of tribal recognition. The Schaghticoke have had over a decade to provide the BIA with evidence that it meets the seven man-

datory federal recognition criteria. The tribe has hired consultants, historians and experts and by its own words has submitted tens of thousands of pages of documentation in its quest for federal recognition. The time for the collection and review of evidence for purposes of the Schaghticoke petition has ended and a final resolution must be reached.

This latest policy reversal by the BIA is not supported by any rationale that warrants a 30 day extension or the allowance of new evidence. The state would also add that it cannot find any authority under the federal regulations that would allow for the submission of the requested new evidence.

The recognition process must have consistency and finality if its decisions are to be accorded respect and acceptance by the general public. This process must remain true to its word and cannot be allowed to continually change, if public confidence is to be maintained. Accordingly, I urge you to deny the Schaghticoke Motion and to reject the BIA Alternative Order. The time has come to salvage the integrity of the recognition process and to provide a resolution to the issues surrounding the Schaghticoke petition once and for all.

Sincerely,

s/ M. Jodi Rell
M. Jodi Rell
Governor

APPENDIX I

United States District Court
District of Connecticut
141 Church Street
New Haven CT 06510

Chambers of
Peter C. Dorsey
United States District Judge

(202) 773 2427

August 19, 2005

M. Jodi Rell, Governor
State of Connecticut
Executive Chambers
Hartford, Connecticut 06108

Dear Governor Rell:

Thank you for your letter of July 11, 2005. Your frustration and impatience is fully warranted. A court-ordered deadline for concluding the administrative proceeding was intended to accommodate three considerations: 1. the tribe's right to due process; 2. the BIA's caseload; and 3. the lawsuit's parties' right to a reasonably prompt resolution of the dispute (including the State's interest) The prolonged protraction of this matter, to resolve the question of tribal recognition, no. 1 has stretched, no. 2 has given the BIA more time than it deserves, and no. 3 has deprived the parties of a reasonably prompt resolution.

I have, in accordance with the view of the U.S. Attorney's Office, allowed a slight extension for a request for technical assistance and information. This was to avoid any claim of infringement of the Tribe's due process. I recognize this does not accommodate

no. 3 above nor the view of your letter. It is intended to be a last extension of time upon the expiration of which the cases will be decided. It reflects a caution intended to avoid a reversal by another Court which might buy a due process argument.

Very truly yours

/s/ Peter C. Dorsey
Peter C. Dorsey

APPENDIX J

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Filed 07/13/2006]

CIVIL NO. H-85-1078(PCD)

UNITED STATES OF AMERICA,
Plaintiff,

v.

43.47 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LITCHFIELD, TOWN OF KENT, ET AL.,
Defendants.

CIVIL NO. 3:98CV01113(PCD)

SCHAGHTICOKE TRIBAL NATION,
Plaintiff,

v.

KENT SCHOOL,
Defendants.

CIVIL NO. 3:00CV00820(PCD)

SCHAGHTICOKE TRIBAL NATION,
Plaintiff,

v.

CONNECTICUT LIGHT & POWER,
Defendants.

MOTION FOR ENTRY OF STIPULATED ORDER

The parties in the above-referenced cases, after several conferences with the Court and after detailed negotiations, have agreed to stipulate to the entry of the attached order governing further proceedings to be conducted before the Department of the * * *

ORDER

The following order is entered to permit, and establish a framework for, the determination by the Department of the Interior ("DOI") on the petition for tribal acknowledgment submitted by the Schaghticoke Tribal Nation. This Order is meant to serve the rights and interests of all parties to the captioned litigation, and allow the DOI to determine the merits of the petition on a schedule other than that set forth in the applicable regulations, 25 C.F.R. Part 83, except as otherwise provided herein. For purposes of the Order, the terms "party" or "parties" include the United States, the petitioner Schaghticoke Tribal Nation ("petitioner"), the defendants in these cases and any amicus curiae parties ("*amici*").

Based upon negotiations conducted among all the parties and *amici* in the above-captioned cases the Court orders the following:

a) The Documented Petition and the administrative correspondence file as of January 19, 2001, have been provided by the Bureau of Indian Affairs ("BIA"), on CD-ROM, to each party and *amici*. The genealogical information from the petition in the Family Tree Maker format, has also been provided to each party and *amici* on computer disks.

b) The design of a database in progress. The design of the database will be finalized and a copy provided to the parties and *amici* by September 1, 2001. All parties and *amici* may, and shall to the extent they have information which permits their doing so, comment on a proposed design by May 1, 2001. Assistant U.S. Attorney John B. Hughes will schedule, in New Haven on June 1 or 4, 2001 a conference to include members of the BIA staff and/or consultants, to permit a detailed discussion with parties, *amici* and counsel of the status of the design and providing details sufficient to permit the parties and *amici* to comment meaningfully on the design. The parties and *amici* shall comment within 14 days. Further comment will only be accepted by BIA on a showing that despite due diligence, the basis for the comment was not reasonably known or available within the time limits set forth herein, and modifications will be made only to the extent feasible and appropriate. The BIA will report, to the court, the parties and *amici*, the status of the design development on June 20, 2001.

c) On or before December 17, 2001, the parties and *amici* shall provide an initial submission of any information or documents deemed appropriate to the determination of the petition for inclusion in the administrative record and database. By February 15, 2002, the parties and *amici* shall submit comments, information, documents, analysis or argument, for inclusion in the administrative record and database. The actual creation of the initial database, after finalization of its design, including any modifications, shall be completed by March 15, 2002. The time period for completion of the database may be extended

by the court depending on the nature and extent of the comments received.

d) The BIA will serve notice of its entry of the data in paragraph (c) into the initial database and serve copies of it on CD-ROM to the parties and *amici*, within five business days. Upon service of such notice, the BIA shall commence development of a proposed finding to be completed within 6 months. All parties and *amici* may provide comments on the initial database for 30 days following service of the database. No new factual documentation will be accepted. Notwithstanding the prior creation of the initial database, it is contemplated that the BIA may alter or add to the database during the decisional process.

e) Upon issuance of the proposed finding, including the summary of the evidence under the criteria, the BIA shall serve it, including, if any, charts and technical reports, on all parties and *amici* within 10 days.The databases as supplemented by BIA staff and any supplemental documents considered by the Assistant Secretary-Indian Affairs in the formulation of the proposed finding, not previously provided to the parties and *amici*, shall be served on all parties and *amici* within 30 days, subject to the assertion of any privileges by DOI. A log identifying the documents and the asserted privileges will be provided.

f) The parties and *amici* shall submit all comments, information, documents, analysis or argument on the proposed finding, including the summary of the evidence under the criteria, within 6 months of its service. Parties and *amici*

may request the court for an extension of the comment period on a showing of good cause which shall mean any cause which could not in the exercise of due diligence be reasonably avoided. Any reply by petitioner shall be filed with the BIA within 30 days of the close of the comment period.

g) Any party or *amici* to these cases wishing technical assistance, as provided in 25 C.F.R. 83.10(j) (2), shall request the same from the Assistant Secretary-Indian Affairs not later than 30 days after service of the proposed finding. Any such request shall be in writing and contain a detailed statement of the questions for which technical assistance is requested. A formal technical assistance meeting compliant with such request(s) and 25 C.F.R. 83.10(j) (2) shall be held in Washington, D.C., within 60 days of the first such request. The BIA will develop an agenda for the formal technical assistance meeting which would permit the BIA staff to cover all of the subject matter areas raised. The parties shall use their best efforts to complete the agenda in two days or less, but in no event shall the meeting last more than three days.

h) The final determination, including the summary of the evidence under the criteria, of the petition shall be issued by the Assistant Secretary-Indian Affairs within 4 months of the end of petitioner's reply period. Notice of the final determination shall be published in the Federal Register, and the BIA shall serve copies of the final determination, including the summary of the evidence under the criteria, on the parties and *amici* within 5 business days of issuance of

the final determination. The database as supplemented by BIA staff and any supplemental documents considered by the Assistant Secretary-Indian Affairs in the formulation of the final determination, not previously provided to the parties and *amici*, shall be served within 30 days of service of the final determination on all parties and *amici* subject to the assertion of any privileges which shall be set forth in a log identifying the documents and the asserted privileges.

i) The final determination shall be effective 90 days from the date notice is published in the Federal Register unless independent reviewand reconsideration is requested under 25 C.F.R. 83.11 or unless any party or *amici* files a petition for district court review as set forth in paragraph (j) below. The final determination shall have no probative effect or value for purposes of the land claim issues remaining for the court's consideration in these cases until such time as a final judgment is entered on any review of the final determination under the Administrative Procedure Act ("APA") and all further rights of appeal have been exhausted. Nothing herein shall prevent any party or *amici* from seeking a court order staying or enjoining the effectiveness of the final determination for any other purposes.

j) The parties and *amici* agree to defer further negotiation of the question of whether, for purposes of this case, an appeal of the final determination to the Interior Board of Indian Appeals (IBIA) may be filed. The negotiation period shall commence three months after the end of the petitioner's reply period as set forth in paragraph (f) above and conclude no later than thirty days

after the final determination is issued by the Assistant Secretary-Indian Affairs. The parties shall report to the court, through Assistant United States Attorney John B. Hughes, within five days of the conclusion of the negotiation period. Participation in such negotiations shall not be construed as a waiver of any right to seek independent review and reconsideration under 25 C.F.R. § 83.11 nor shall any party, *amici*, or interested party be compelled to forego such right. The negotiations among the parties shall be limited to the question of whether, for purposes of this case, the appeal of the final determination for independent review and reconsideration under 25 C.F.R. § 83.11 is to be made to the IBIA or shall be a part of a petition for review filed in the District Court under the Administrative Procedure Act. If a party requests independent review and reconsideration under 25 C.F.R. § 83.11(a)(1) and the Interior Board of Indian Appeals (IBIA) determines to take the appeal under § 83.11(c) (2), any party may request the Interior Board of Indian Appeals (IBIA) to expedite its consideration of and decision in such proceedings and represent in such request that the other parties who are subject to this Order give their consent thereto, except the Department of the Interior which agrees not oppose the request. If as a result of the negotiations, however, the parties agree that the issues for review set forth in 25 C.F.R. § 83.11 may be included in any petition for review filed with the District Court under the Administrative Procedure Act, such issues shall be decided by the Court as part of such review under the standards identified in 25 C.F.R. § 83.11. Upon any such combined peti-

tion for review the Court shall determine the effective date of the final determination from which the petition for review has been taken.

k) Any petition for review of the final determination under the Administrative Procedure Act by any party to these cases shall be filed within 90 days of the date that notice of the final determination was served and shall be filed in this court as a case related to the above-captioned cases.

l) Nothing in this order shall prohibit any party or *amici* from requesting informal technical assistance from BIA staff nor prohibit the BIA Branch of Acknowledgment and Research ("BAR") staff from providing technical assistance in response to such requests pursuant to 25 C.F.R. § 83.10(j)(1). No non-federal party or *amici* shall communicate or meet with any officials in the immediate offices of the Secretary of the Interior, the Assistant Secretary-Indian Affairs or the Deputy Commissioner of Indian Affairs with respect to this petition, without notification to the other parties.

m) The parties shall be permitted to conduct discovery as provided for in the Federal and Local Rules of Civil Procedure, and in accordance with the previously entered Confidentiality Order, except that no discovery shall be directed against the United States Department of the Interior. Such discovery shall be relevant to the issue of tribal acknowledgment of the petitioner, unless the petitioner and a requesting party otherwise agree. Written discovery directed against a party to these proceedings shall be propounded not later than December 1, 2001. Discovery directed

to or against persons or entities who are not parties to these proceedings may be made at any time. Discovery requests and responses shall be provided to all parties to this agreement. Copies of deposition transcripts shall be made available to all parties and *amici* as provided in the Federal Rules of Civil Procedure. Such responses and transcripts will not be included in the database or administrative record unless specifically submitted for inclusion.

n) Extensions of time may be allowed by the court for good cause which shall mean any cause which could not in the exercise of due diligence be reasonably avoided.

o) Except as otherwise provided in this Order the regulations set forth in 25 C.F.R. Part 83 are applicable to the BIA's consideration of the Schaghticoke Tribal Nation's petition.

p) Any pleadings, documents, correspondence or other materials filed with this Court or with DOI, BIA, or BAR by any party or *amici* shall be served on all parties and *amici* in accordance with Rule 5, Federal Rules of Civil Procedure.

q) All proceedings in this court on these cases shall be stayed except as otherwise provided herein or unless leave of court is granted or all the parties agree.

SO ORDERED.

Dated at New Haven, Connecticut, May 8, 2001

/s/ Peter C. Dorsey
Peter C. Dorsey
Senior United States District Judge

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Filed 10/04/2005]

Case No: H-85-1078 (PCD)

UNITED STATES OF AMERICA,
Plaintiff,

v.

43.47 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF LITCHFIELD, TOWN OF KENT, ET AL.,
Defendants.

Case No. 3:98cv1113 (PCD)

SCHAGHTICOKE TRIBAL NATION,
Plaintiff,

v.

KENT SCHOOL,
Defendant,

Case No. 3:00cv820 (PCD)

SCHAGHTICOKE TRIBAL NATION,
Plaintiff,

v.

UNITED STATES OF AMERICA AND CONNECTICUT LIGHT AND POWER COMPANY,
Defendants.

ORDER OF CONSOLIDATION

Three cases pending before this Court (*United States of America v. 43.47 Acres of Land*, Civ. No. H-85-1078; *Schaghticoke Tribal Nation v. Kent School Corporation, Inc., et al.*, Civ. No. 3-98-cv-01113; and *Schagticoke Tribal Nation v. United States of America and the Connecticut Light and Power Company, et al.*, Civ. No. 3-00-cv-0820) shall be consolidated on the basis that the cases involve common questions of fact and law. Motions filed under Civ. No. H-85-1078 will be deemed to applicable to the other two cases, with the exception of filings that are noted to pertain specifically to other of the three cases.

SO ORDERED.

Dated at New Haven, Connecticut, October 3, 2005

/s/ Peter C. Dorsey
Peter C. Dorsey
U.S District Judge
United States District Court

APPENDIX L

Federal Register
Vol. 69, No. 24
Thursday, February 5, 2004
Notices

DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs
Final Determination To Acknowledge the Schaghticoke Tribal Nation

AGENCY: Office of Federal Acknowledgment, Interior.

ACTION: Notice of final determination.

SUMMARY: Pursuant to 25 CFR 83.10(m), notice is hereby given that the Assistant Secretary—Indian Affairs acknowledges the Schaghticoke Tribal Nation do Mr. Richard L. Velky, 33 Elizabeth Street, 4th Floor, Derby, Connecticut 06148, as an Indian tribe within the meaning of Federal law. This notice is based on a determination that the petitioning group satisfies all seven criteria for Federal acknowledgment as a tribe in 25 CFR 83.7, and therefore meets the requirements for a government-to-government relationship with the United States.

DATES: This determination is final and is effective May 5, 2004, pursuant to 25 CFR 83.10(l)(4), unless a request for reconsideration is filed pursuant to 25 CFR 83.11. On-going negotiations in current litigation may modify or eliminate the applicability of this provision of the regulations.

FOR FURTHER INFORMATION CONTACT: R. Lee Fleming, Director, Office of Federal Acknowledgment, (202) 513-7850.

SUPPLEMENTARY INFORMATION: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.

This notice is based on a determination that the Schaghticoke Tribal Nation (STN) satisfies the seven criteria for Federal acknowledgment as an Indian tribe in 25 CFR 83.7.

The Department is considering the STN petition under a court approved negotiated agreement between the STN, the State of Connecticut, and other interested parties involved in pending litigation. This agreement neither modifies the criteria nor the standards required to demonstrate that all of the criteria have been met.

A notice of proposed finding (PF) to decline to acknowledge the STN was published in the Federal Register December 11, 2002 (67 FR 76184). That notice was based on a determination that the petitioner did not satisfy all seven of the criteria set forth in 25 CFR 83.7, specifically criteria 83.7(b), and (c), and therefore did not meet the requirements for a government-to-government relationship with the United States,

The evidence available at the time of the PF showed that the STN petitioner and its antecedents met criteria 83.7(a) for identification as a Indian entity since 1900, 83.7(d) for providing a governing document, 83.7(e) for having a membership list and demonstrating descent from the historical tribe, 83.7(f) for not being members of an acknowledged Indian tribe, and 83.7(g) for not being the subject of legislation that terminated or forbade the Federal relationship. The PF concluded that tin petitioner did

not meet the requirements for criteria 83.7(b) to demonstrate community from first sustained historical contact to the present because there was insufficient evidence to demonstrate that community existed between 1940 and 1967. The PF concluded that the petitioner did not meet criterion 83.7(c) for political influence or authority from first sustained historical contact to the present. The PF concluded that the evidence was insufficient to demonstrate that the Schaghticoke met criterion 83.7(c), political influence within the group, from 1801 to 1875, that there was almost no specific evidence of Schaghticoke political activity from 1885 to 1949, and that there was insufficient evidence of political activity from 1949 to 1967. The PF concluded further concerning criterion 83.7(c) that the continuous state relationship with a reservation did not provide additional evidence during those periods when there was an absence of specific evidence of the exercise of political influence within the group within the meaning of the acknowledgment regulations.

Criteria 83.7(b) and 83.7(c) were also not met after 1996 because the STN's 2001 membership list (317 members) used for the PF did not include approximately 60 individuals, who were a part of the Schaghticoke social and political community between 1967 and 1996. These criteria were also not met because almost a third of the membership (110 of 317) were from a family line that was not part of the community and had no known social and political contact with the Schaghticoke before 1996.

This final determination (FD) is made following a review of the responses to the PF, the public comments on the PF, and STN responses to the public comments. This FD has reviewed the evidence considered for the

PF, and evaluated that evidence in the light of the new documentation and argument received from third parties and the petitioners. This FD reevaluates the evidentiary weight given to continuous state recognition with a reservation.

The PF found that the Schaghticoke were regularly identified as an American Indian entity in Federal and state documents, by local authorities, b academic scholars, and in newspaper articles since 1900, thus meeting criterion 83.7(a). Neither the petitioner nor the third parties addressed criterion 83.7(a) in the comments on the PF. Some exhibits submitted for the FD provided additional external identifications of Schaghticoke as an American Indian entity from 1900 to the present. The conclusion of the STN PF that the petitioner meets criterion 83.7(a) is affirmed.

The PF found that Moravian mission records (1743 through 1771), the continued existence of a distinct residential settlement, repeated petitions by the group to the Colony am the State, and a detailed external enumeration of all members by name and age in 1789, demonstrated that there was a Schaghticoke community from the 1740's to 1801. Throughout the 19th century, the overseers' reports, the existence of a distinct geographical settlement to which off-reservation residents frequently returned, and the close kinship ties between reservation residents and non-resident members provided sufficient evidence to show that a Schaghticoke community existed until about 1900. The additional analysis of the evidence undertaken for the FD strengthened these conclusions. The FD affirms that the Schaghticoke meet 83.7(b) through 1900.

Additional evidence submitted for the FD confirms the conclusions of the PF that a portion of the

Schaghticoke formed a residential community on the reservation between 1900 and 1920. Other Schaghticoke, resident off-reservation, maintained social ties as part of the group, had been born on and/or lived on the reservation, and were close relatives of the reservation residents. Additional analysis of residential and intermarriage patterns for the 19th century, which provided sufficient evidence for community until 1870 and strong evidence for community for the balance of the 19th century, provides supporting evidence for the existence of a community in the first two decades of the 20th century. Additional documentary sources were provided which identified a community on the reservation and recognized the connection between reservation and non-reservation residents. These forms of evidence combined provide sufficient evidence to demonstrate that criterion 83.7(b) is met from 1900 to 1920.

For 1920 to 1940 there was less specific evidence concerning community, but the reservation continued to be occupied during these decades. Interview evidence demonstrated social ties between the three major Schaghticoke family lines. The State made appropriations in both decades for the Schaghticoke and passed legislation transferring supervision of the Schaghticoke from one state agency to another. Documentary evidence from this period includes references to the Schaghticoke as an existing group. Continuous state recognition with a reservation provides additional evidence here, where specific evidence of community exists. Therefore, the STN meets criterion 83.7(b) from 1920 to 1940.

A thorough review of the existing data together with the new data submitted in response to the PF demonstrates that community existed among the

Schaghticoke between 1940 and 1967. A review of the oral histories, including new information added to the record in response to the PF, demonstrates that significant social relationships existed between, as well as within, the three main family lines during this time period.

The documents and oral histories of the 1936 to 1967 era concerning political activities demonstrate social and political contact, as does the oral history of reservation meetings during that period. Additional evidence is that the enrollments in 1949 and 1954 generally correspond with the families of Schaghticoke who enrolled between 1967 and 1973, indicating the continuity of the Schaghticoke's definition of their community.

Continuous state recognition provides additional evidence here, where specific evidence of community exists. Based on the new evidence and the analysis and reevaluation of the evidence already in the record, this FD concludes that criterion 83.7(b) is met between 1940 and 1967.

The evidence for community and political processes for 1967 to 1996 was based on the political processes in the internal conflicts in this period, as well as the nature of the membership. Supportive evidence for community from 1967 to 1996 for the PF and for this FD was that enrollment in the Schaghticoke organization beginning in 1970 was almost entirely drawn from a select subset of the much larger pool of all Schaghticoke descendants, those who were from families that had remained in social contact since the petitions of 1876 and 1889. This FD confirms the conclusion of the PF that there is sufficient evidence for political processes for 1967 to 1996. This FD adds additional evidence and analysis of conflicts which

mobilized substantial number of members and showed contact between members, providing additional evidence to demonstrate community. Therefore, this FD confirms that criterion 83.7(b) is met from 1967 to 1996.

The evidence for community and political processes for 1967 to 1996 and the nature of membership and the political processes in the internal conflicts exist for 1996 to the present as well. The conflicts have continued up until the present, and social contacts have continued between the enrolled and unenrolled portions of the Schaghticoke community.

The evidence demonstrates that the Schaghticoke have existed as a community from first sustained contact until the present. The most recent STN membership list is incomplete and does not include a substantial portion of the present Schaghticoke community. This FD concludes that the STN, including the presently unenrolled portion of the community, meets the requirements of 83.7(b).

The State of Connecticut has, since colonial times, continuously recognized the Schaghticoke as a distinct tribe with a separate land base provided by and maintained by the State. The continuous state relationship manifested itself in the distinct, non-citizen status of the tribe's members until 1973. There is implicit in the relationship between the State and the Schaghticoke a recognition of a distinct political body, in part because the relationship originates with and derives from the Colony's relationship with a distinct political body at the time the relationship was first established. Colonial and state laws and policies directly reflected this political relationship until the early 1800's. The distinct political underpinning of the laws is less explicit from the early 1800's until

the 1970's, but the Schaghticoke remained non-citizens of the State until 1973. The State continued the main elements of the earlier relationship (legislation that determined oversight, established and protected land holdings, and exempted tribal lands from taxation) essentially without change or substantial questioning throughout this time period.

The state relationship is documented to be continuously active throughout the history of the Schaghticoke, as demonstrated by state overseer actions, state statutes, and other actions of the executive, judicial and legislative branches of Connecticut's colonial and state governments. There are such state actions throughout the periods where there is little or no direct evidence of political influence within the group, 1820 to 1840 and 1892 to 1936.

In making this FD, the Department has reevaluated the evidentiary weight that was given to continuous state recognition with a reservation from colonial times until the present in the STN PF and in the Historical Eastern Pequot (HEP) PF and FD decisions. The position in those decisions was that the state relationship was not a substitute for direct evidence of political processes in a given period of time and could only add evidence where there was some, though insufficient, direct evidence of political processes.

The Department's reevaluated position is that the historically continuous existence of a community recognized throughout its history as a political community by the State and occupying a distinct territory set aside by the State (the reservation), provides sufficient evidence for continuity of political influence within the community, even though direct evidence of political influence is almost absent for

two historical time periods. This conclusion applies only because it has been demonstrated that the Schaghticoke have existed continuously as a community, within the meaning of criterion 83.7(b), and because of the specific nature of their continuous relationship with the State. Further, political influence was demonstrated by direct evidence for very substantial historical periods before and after the two historical periods. Finally, there is no evidence to indicate that the tribe ceased to exist as a political entity during these periods.

For this FD, the historical periods in which there is insufficient direct evidence of political processes are substantially reduced from the PF. These periods are 1820 to 1840 and 1892 to 1936. Within the first period, evidence of community is strongly established. During the decade 1821—1830, there was an overall endogamy rate of 40 percent. During the decade 1831-1840, there was an overall endogamy rate of 35 percent. The rates for these two decades were substantial and provide strong evidence for the existence of community. However, they are below the 50 percent level required to provide carryover by themselves to demonstrate political influence or authority for the petitioner under 83.7(c)(3) for the two decades 1821—1840.

The conclusion of the FD is that the antecedents to this petitioner, the Weantinock (which were centered at New Milford) and Potatuck (which were centered at Newtown), existed as tribes at the time of first sustained contact. The Schaghticoke did not, as the third parties argue, begin as a "group of individual Indians and families" who in the mid-1700s "coalesced from diverse locations and tribes long after there was a sustained presence of Europeans in western Connecticut." This FD does not accept the third parties'

argument that the Schaghticoke did not exist at the time of first sustained contact with non-Indians nor the second argument that they do not derive from nor are a successor to any tribe or tribes that existed at the time of first sustained contact.

This FD rejects the third party argument that there must be evidence in the record of continuity of tribal political and social processes and conscious acts of amalgamation to create a Schaghticoke Tribe from the antecedent Weantinock and Potatu.ck. Neither the 25 CFR part 83 regulations nor precedent require an express decision when two tribes amalgamate. Amalgamation can occur over time. In this case, a specific early example of such common action is the May 13, 1742, petition directed to the General Assembly in which, "Mowehu Cherry and others hereunto subscribing Being Indian Natives of this Land Humbly Sheweth, that there are at New Milford, and Potatuck the Places where we Dwell about Seventy Souls of us" and requested missionaries.

For the time period 1736-1801, the PF found the petitioner met criterion 83.7(c) for political authority or influence within the group from the appearance of a distinct group at Schaghticoke, where the Connecticut General Assembly assigned it land in 1736 and where there was a Moravian mission from 1743 until 1771, until about 1801. The FD confirms this conclusion.

The PF found that there was insufficient evidence to demonstrate that the Schaghticoke met criterion 83.7(c) for the period from 1801 to 1875. There remains little direct evidence concerning political authority or influence among the Schaghticoke for this time period. However, criterion 83.7(c)(3) provides: "A group that has met the requirements in paragraph 83.7

(b)(2) at a given point in time shall be considered to have provided sufficient evidence to meet this criterion at that point in time." For the FD, taking into account submissions by the petitioner and third parties, a detailed, decade-by-decade, analysis was made to determine whether petitioner meets 83.7(b)(2): "At least 50 percent of the marriages in the group are between members of the group." On the basis of these calculations, the endogamy rate was sufficient that the STN meets criterion 83.7(e) from 1801-1820 and 1841-1870 under 83.7(e)(3).

The PF concluded that two petitions submitted in 1876 and 1884, signed by a number of Schaghticoke Indians living on the reservation and some living off the reservation, provided sufficient evidence that the group exercised some political influence or authority for that limited time period. For the FD, there is limited additional context for the two above petitions, which strengthens the conclusion of the PF that they show political influence and authority within the group at these dates. Both the 1876 and 1884 Schaghticoke petitions for appointment of an overseer were presented shortly after the passage by the Connecticut legislature of legislation that affected the Schaghticoke tribe. The evidence submitted for the FD also documented a third petition, which requested an audit of the tribe's funds. It was submitted in 1892 on behalf of the tribe by a member who had signed both the 1876 and 1884 petitions and was acted upon by the court, which appointed the auditors requested by the tribe. The auditors were paid from tribal funds.

The residency rate on the reservation in 1870 was 48 percent and in 1880 it was 40 percent. This is strong evidence for community for the period

1870—1880, which is supporting evidence for political influence, under section 83.7(c)(1)(iv).

On the basis of the additional evidence provided by the 1892 petition, the strong evidence of community in combination with the direct evidence for political influence demonstrates that the STN meets criterion 83.7(c) from 1870 through 1892.

This FD concludes there is little direct evidence to demonstrate political influence within the Schaghticoke between 1892 and 1936. This FD rejects many of the specific arguments presented by the petitioner to demonstrate significant political influence within the Schaghticoke between 1892 and 1936.

There was no evidence to demonstrate the political influence did not exist within the Schaghticoke from 1892 to 1934. There are several individuals who were well-known to non-Indians and were of some stature, but no contemporary evidence to demonstrate that they were identified as leaders by Schaghticoke or outsiders. Oral histories collected substantially later identify several individuals as leaders. The lack of evidence of overt political activity may have been influenced by demographic trends, which resulted in the relatively early deaths of many of the children of the petition signers of 1876 and 1884, limiting potential leaders in this time period. Two report one in 1934 and one in 1936, denied that the Schaghticoke at that time or recent years," had leaders. The first report does not provide definitive evidence by itself, and the second, in 1936, is at the point in time when there is specific evidence of Schaghticoke leaders.

A well defined community of on and off-reservation residents existed throughout the 1892 to 1936 time period. Community, when it is demonstrated to exist

at more than a minimal level, which has been done here, provides supporting evidence for direct evidence of political processes (83.7(b)(1)(iv)).

Although there is insufficient direct evidence to demonstrate criterion 83.7(c) between 1892 and 1936, this FD concludes that overall, based on the continuous state relationship with a state-provided reservation, and the demonstration of continuous community under 83.7(b), there is sufficient evidence of political continuity throughout the Schaghticoke history that the STN meets the requirements of 83.7(c) between 1892 and 1936.

For this FD, the evidence is significantly greater than for the PF concerning political processes within the Schaghticoke from 1936 to 1967. The evidence is that the organization that Franklin Bearce helped initiate, and the activities of named leaders, lasted for a substantially longer period of time, from 1936 to the mid-1960's, than was demonstrated for the PF. There is better evidence that the organization and office holders dealt with issues of significance to the group and that there was continuity of concern with the issue of protecting the reservation throughout this period, beginning with a possible Court of Claims suit in 1936, letters to the State in 1939, a 1943 letter to the U.S. Indian Service, a 1950 claim before the Indian Claims Commission (ICC) and a renewed land claims lawsuit in 1963, after the rejection of the ICC claim. There is also evidence of continued internal conflicts and involvement of individuals from each the three major family lines throughout the entire time period, indicating that the conflicts involved the entire community. The years between 1959 and 1969 were a period of political division, rather than there

being a hiatus, as had appeared based on the analysis and evidence for the PF.

For the PF, there was not sufficient evidence to demonstrate that community had been demonstrated for the time period from 1940 to 1967. For this FD, community has been demonstrated for 1940 to 1967. For this FD, for the period from 1936 to 1967, where there is more evidence in the record than for the PF, the state relationship in combination with the specific evidence in the record for this period adds sufficient evidence that criterion 83.7(c) is met from 1936 to 1967.

This FD confirms the PF conclusion that there is ample evidence for political processes for 1967 to 1996. No information was submitted which demonstrated that the conflicts, described in some detail in the PF, had not occurred or not mobilized most of the membership. For this FD, there is additional evidence and analysis of the conflicts between 1967 and 1974 which mobilized substantial number of members and show contact between members. This provides additional evidence for criterion 83.7(c) for this time period.

The same evidence for political influence for 1967 to 1996, based on the political processes in the internal conflicts, exists for 1996 to the present as well. The conflicts have continued up until the present, especially, but not entirely, between the enrolled and unenrolled portions of the Schaghticoke community. This FD concludes that a single political body continues to exist, notwithstanding the absence from the certified membership list of an important segment of those involved in STN political processes from the 1960's to the present. This FD acknowledges the entirety of this political body.

There has been a continuous, active relationship from colonial times to the present between the State and the Schaghticoke in which the State treated them as a distinct political community. The historical continuity of the group has been demonstrated. This state relationship provides sufficient evidence to conclude that political influence existed continuously within the Schaghticoke, including two specific historical periods during where there is almost no direct evidence of political influence, but during which community has been demonstrated. The Schaghticoke therefore meet criterion 83.7(c) throughout their history.

The STN meets the requirements of criterion 83.7(d) because it submitted a copy of its governing document: A constitution adopted in 1997 which included a description of its membership criteria.

The regulations require, under criterion 83.7(e), that a petitioner submit a complete list of its membership. In this instance, the petitioner has identified its most current certified list as not complete. It submitted two lists, the certified membership list and a list of the "Unenrolled Schaghticoke Community." This FD acknowledges the tribe as defined by the STN's 2003 membership list, 273 members, and its additional list of 42 individuals, identified by the STN as part of its community and meeting its membership requirements. Together these two lists comprise the STN's base membership roll and its present membership for Federal purposes.

The STN provided sufficient evidence to show that all 273 individuals on the September 28, 2003, certified membership list and the 42 individuals listed on the September 28, 2003, amendment to the constitution

who are "unenrolled tribal community members" descend from the historical tribe.

One hundred percent of the STN membership descends from the historical Schaghticoke tribe. Therefore the conclusion in the PF that the STN meets criterion 83.7(e) is confirmed.

No members of the STN are known to be dually enrolled with any federally acknowledged American Indian tribe. Neither the petitioner nor any of the interested parties addressed this criterion. Therefore, the conclusion in the PF that the STN meets criterion 83.7(f) is confirmed.

There has been no Federal termination legislation in regard to the STN. Neither the STN nor any interested parties addressed this criterion. Therefore, the conclusion in the PF that the STN meets criterion 83.7(g) is confirmed.

The Schaghticoke Tribal Nation, as defined by its 2003 membership list and its 2003 list of unenrolled community members meets all of the criteria for Federal acknowledgment as a tribe stated in 25 CFR 83.7 and, therefore, meets the requirements to be acknowledged as tribe with a government-to-government relationship with the United States.

This determination is final and will become effective May 5, 2004, unless a request for reconsideration is filed before the Interior Board of Indian Appeals (IBIA) pursuant to 25 CFR 83.11 or unless any party or amid in the litigation files for Administrative Procedures Act (APA) review with the district court. In addition, the court approved negotiated agreement calls for negotiation as to whether a request for reconsideration may be filed before the IBIA or whether judicial review under the APA is the only

review. The on-going negotiation will continue until no later than 30 days after publication of this Notice. This negotiation may impact the ability of interested parties, whether parties to the litigation or not, to seek reconsideration before IBIA, Inquiries by interested parties concerning the availability of the IBIA review should be directed to the Office of the Solicitor, Branch of Tribal Government and Alaska, 202-208-6526, Attention: Scott Keep or Barbara Coen.

Dated: January 29, 2004.

Aurene M. Martin,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 04-2532 Filed 2-4-04; 8:45 am]

APPENDIX M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Reconsidered Final Determination To Decline To Acknowledge the Schaghticoke Tribal Nation

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Associate Deputy Secretary has determined that the Schaghticoke Tribe Nation (STN) does not satisfy all seven criteria for acknowledgment as an Indian tribe in 25 CFR 83.7. Upon the date of publication of this notice, pursuant to 25 CFR 83.11(h)(3), the Reconsidered Final Determination (RFD) is final and effective for the Department of the Interior (Department). EFFECTIVE DATE: The procedures defined by this notice are effective on October 17, 2005.

FOR FURTHER INFORMATION CONTACT: R. Lee Fleming, Director, Office of Federal Acknowledgment (OFA), MS: 34B–SIB, 1951 Constitution Avenue, NW., Washington, DC 20240, phone (202) 513-7650.

SUPPLEMENTARY INFORMATION: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Associate Deputy Secretary by Secretarial Order 3259, February 8, 2005, as amended on August 11, 2005.

This notice is based on a determination that the Schaghticoke Tribal Nation (STN) does not satisfy all of the seven mandatory criteria for acknowledgment in 25 CFR 83.7.

Several lawsuits filed in the Federal courts affected the history and administrative handling of the

Schaghticoke Tribal Nation petition. Two of these were land claims suits under the Non-Intercourse Act, *Schaghticoke Tribal Nation v. Kent School Corp., Inc.*, Civil No. 3:98 CVO1113 (PCD) and *Schaghticoke Tribal Nation v. Connecticut Light and Power Company*, Civil No. 3:00 CV00820 (PCD). The third lawsuit is *United States of America v. 43.47 Acres of Land, et al.*, Civil No. H-85–1078(PCD), filed on December 16, 1985, in which the U.S. sought to condemn certain lands on the Schaghticoke Reservation to become part of the Appalachian Trail. All three lawsuits involve the question of whether the STIN is an Indian tribe.

The Department conducted its evaluation of this petitioner under a court-approved negotiated agreement between the Department, STN, and parties to the several, concurrent lawsuits mentioned above. This scheduling order, entered May 8, 2001, and subsequently amended, established timelines for submission of materials to the Department and deadlines for submission of comments, issuance of a proposed finding (PF), and issuance of a final determination (FD) which superseded the provisions of the acknowledgment regulations, 25 CFR part 83.

The Department published notice of the STN PF on December 11, 2002, and found against acknowledgment of STN. Following the comment and response periods and the submission of new evidence, the Department concluded, relying in part on the state relationship and a calculation of marriage rates within the Schaghticoke as carryover evidence for criterion 83.7(c), that STN met all the seven mandatory criteria for acknowledgment as an Indian tribe. In accordance with the court-approved negotiated schedule, on January 8, 2003, the Department pro-

vided the petitioner and interested parties with a copy of the Federal Acknowledgment Information Resource (FAIR) database used for the STN PF, together with the scanned images of documents that OFA researchers added to the administrative record in the course of preparing the STN PF, including materials that OFA requested from the State and the STN.

The Department issued the STN FD acknowledging the STN as an Indian tribe on January 29, 2004, and notice of the STN FD appeared in the Federal Register on February 5, 2004 (69 FR 5570). On May 3, 2004, the State of Connecticut (State), jointly with the Kent School Corporation, Connecticut Light and Power Company, the towns of Kent, Danbury, Bethel, New Fairfield, Newton, Ridgefield, Stamford, Greenwich, Sherman, Westport, Wilton, Weston, and the Housatonic Valley Council of Elected Officials, the Coggswell family group (CG), and the Schaghticoke Indian Tribe (SIT) petitioning group filed timely requests for reconsideration of the STN FD with the Interior Board of Indian Appeals (IBIA).

On May 12, 2005, the IBLA vacated the STN FD and remanded it to the Assistant Secretary-Indian Affairs for further work and reconsideration. The IBM decision addressed a number of issues within the context of the related Federal acknowledgment decision of the Historical Eastern Pequot FD that was also vacated and remanded to the Department on May 12, 2005. IBIA linked the two cases because of their reliance on state recognition as additional evidence for criterion 83.7(b and 83.7(c).

In its request for reconsideration of the STN FD, the State challenged the use of the historically continuous state recognition and the state relationship

a: providing evidence for criterion 83.7(b) "community" and criterion 83.7(c) "political influence or authority." Moreover, the State argued that even if the use of the state relationship were to be upheld by IBIA in the case of the Historical Eastern Pequot, it should not be allowed for STN, since the STN FD, in the opinion of the State, "impermissibly" expanded the use of the state relationship as evidence of political influence or authority in the absence of evidence of political activity within the group (41 IBIA 34). In regard to the use of the state relationship as evidence, IBIA concluded:

Today, in *Historical Eastern Pequot Tribe*, the Board concludes that the State of Connecticut's "implicit" recognition of the Eastern Pequot as a distinct political body—even if a correct characterization of the relationship—is not reliable or probative evidence for demonstrating the actual existence of community or political influence or authority within that group. The FD for STN used state recognition in the same way that we found to be impermissible in *Historical Eastern Pequot Tribe*. In addition, we agree with the State that the STN FD give; even greater probative value and evidentiary weight to such "implicit" state recognition, and therefore it constituted a substantial portion of the evidence relied upon. Therefore, in light of our decision in *Historical Eastern Pequot Tribe*, the Board vacates the FD and remands it for reconsideration in accordance with that decision (41 IBLA 34).

The IBIA also evaluated other issues raised by the State and other interested parties in the requests for reconsideration that were outside of its jurisdiction and referred these issues to the Department to consider. The State challenged the STN FD's calculations of marriage rates for the period 1801 to 1870 used for

carryover evidence to satisfy criterion 83.7(c). Moreover, OFA submitted a "supplemental transmission" to IBIA regarding the calculation of marriage rates on December 2, 2004. Based on the allegation raised by the State regarding the marriage rate calculations, and within the context of the supplemental transmission, the IBIA concluded:

> Because we are already Vacating and remanding the FD to the Assistant Secretary for reconsideration based on *Historical Eastern Pequot Tribe*, and because OFA has acknowledged problems with the FD's endogamy rate calculations--at a minimum, inadequate explanation—we conclude that this matter is best left to the Assistant Secretary on reconsideration. (41 IBIA 36).

The IBIA referred other allegations made by the State, SIT, and the CG based on the determination that it lacked jurisdiction over the issues. The first was the claim that the STN FD enrolled 42 non-STN members into the STN petitioning group. The SIT and the CG also raised the issue that the enrollment was not based on the notice, consent, or equal protection of those added to the STN rolls, that the 42 individuals in question were not sufficiently linked to STN, and the individuals were not a part of the STN social and political community. The RFD concluded that the STN FD should be reconsidered on the grounds that at least 33 of the 42 individuals on the STN list of "unenrolled members" were not members of STN because they had not consented to enroll. Under the regulations, one must consent to being a member of a petitioning group.

Criterion 83.7(b) "community": The STN PF found and the STN FD affirmed that STN met criterion 83.7(b), community, from first sustained contact to

1900 (STN PF, 15-16, STN FD, 18). The STN FD did not rely on the state relationship for criterion 83.7(b), community, for this period. Therefore, the RFD reaffirmed the STN FD for this time period, first sustained contact to 1900.

The RFD reanalyzed STN marriage rates, and found that marriage rates provided evidence in combination with other evidence sufficient to satisfy criterion 83.7(b) for the period 1801-1900. The STN FD did not rely on the state relationship for criterion 83.7(b), community, for the period 1900-1920. The STN FD used a combination of evidence including residential and intermarriage patterns to conclude that STN met criterion 83.7(b), community, between 1900 and 1920. The RFD reaffirmed the STN FD for this time period.

The STN FD relied on the state relationship as additional evidence for criterion 83.7(b), community, for the periods 1920-1940 and 1940-1967. The RFD reevaluated the state relationship with the STN, and concluded that it did not provide evidence of 83.7(b), community, within STN. The RFD reevaluated the evidence for community without the state relationship for these periods, and found that there was insufficient evidence for STN to meet criterion 83.7(b), community for 1920-1967.

The STN FD did not rely on state recognition for community for the period 1967-1996. Therefore, the STN FD conclusion that STN met criterion 83.7(b), community, for these years was affirmed.

For the period after 1996, the RFD concluded that at least the 33 of 42 individuals who specifically declined to consent to be part of the STN petitioner cannot be considered members of the STN group. The STN, thus, did not represent the entire Schaghticoke

community from 1997 to the present and, therefore, did not meet criterion 83.7(b). Therefore, the STN did not meet criterion 83.7(b), community.

Criterion 83.7(c) "political influence or authority": The RFD affirmed the finding of the STN FD that the petitioner met the requirements of criterion 83.7(c) for political influence or authority from the colonial period to 1801. The STN FD used marriage rates for the periods 1801 to 1820 and 1841 to 1870 under criterion 83.7(b)(2)(ii) to provide carryover evidence under 83.7(c)(3). The RFD recalculated marriage rates for the period 1801 to 1900, and reversed the finding of the STN FD that marriage rates reached the 50 percent threshold to provide carryover evidence to meet 83.7(c). The RFD also reevaluated the evidence for residency rates for the period 1850 to 1902. The RFD affirmed the conclusion of the STN FD that the residency rates were not high enough to provide carryover evidence to meet criterion 83.7(c). The RFD reviewed the evidence for political influence or authority for the period 1801 to 1875, and found that there was insufficient evidence to satisfy criterion 83.7(c).

The RFD affirmed the finding of the STN FD that two Schaghticoke petitions to the State from the years 1876 and 1884 provided sufficient evidence of political influence or authority to meet criterion 83.7(c) for the years 1876-1884. The RFD reevaluated the evidence regarding an 1892 petition based on new evidence submitted to the IBIA, and found that this document did not provide evidence of the existence of political influence or authority within the Schaghticoke. Therefore, the RFD concluded that STN did not meet criterion 83.7(c) for the period 1885-1892.

The STN FD relied on the state relationship to provide sufficient evidence to meet criterion 83.7(c) for the period 1892 to 1935. The RFD reevaluated the state relationship and concluded that it did not provide additional evidence of political influence or authority within the Schaghticoke. The RFD reevaluated the remaining evidence for political influence or authority without the state relationship and found that there was insufficient evidence to meet criterion 83.7(c) for this period.

For the period 1936-1967, the RFD reevaluated the state relationship and concluded that it did not provide additional evidence of the exercise of political influence or authority within the Schaghticoke. The RFD concluded that the remaining evidence was insufficient to meet criterion 83.7(c) for the period 1936-1967.

The STN FD conclusion that STN exercised political influence or authority between 1967 and 1996 was affirmed. No arguments or new evidence were submitted regarding this conclusion.

STN did not meet criterion 83.7(c) for the period after 1996, in light of the known continued refusal of most of the 42 individuals to be members of the STN. STN's membership list does not reflect a significant portion of the political system. STN did not meet criterion 83.7(c) for the periods 1800-1875, 1885-1967, and 1997-present Therefore, STN did not meet criterion 83.7(c).

STN met criteria 83.7(a), petitioner was identified as an American Indian group from 1900 to present; 83.7(d), petitioner has submitted its governing documents; 83.7(e), petitioner's membership has descent from an historical tribe; 83.7(f), petitioner does not

have membership with any federally recognized tribes; and 83.7(g), petitioner has no Congressional legislation prohibiting the Federal relationship. No new arguments, evidence, or analysis merited revision of the STN FD evaluations of these criteria. The conclusions of the STN FD on these criteria were affirmed.

The Associate Deputy Secretary denied to acknowledge that STN was an Indian tribe as it failed to satisfy all of the seven mandatory criteria for Federal acknowledgment under the regulations. The STN petitioner did not submit evidence sufficient to meet criteria 83.7(b), community, and 83.7(c), political influence or authority, and, therefore, does not satisfy the requirements to be acknowledged as an Indian tribe.

Upon the date of publication of this notice, pursuant to 25 CFR 83.11(h)(3), the RFD is final and effective for the Department.

Dated: October 11, 2005.

James E. Cason,

Associate Deputy Secretary.

[FR Doc. 05-20719 Filed 10-12-05; 2:26 pm]

BILLING CODE 4310-W7-P

APPENDIX N

_____

(Original Signature of member)

109TH CONGRESS
1ST SESSION
H.R._____

To repeal the Federal acknowledgment of the Schaghticoke Tribal Nation

IN THE HOUSE OF REPRESENTATIVES

Mrs. JOHNSON of Connecticut introduced the following bill which was referred to the committee on _____

A BILL

To repeal the Federal acknowledgment of the Schaghticoke Tribal Nation.

Be it enacted by the Senate and House of Representatives of the States of America in Congress assembled,

SECTION 1 SHORT TITLE

This Act may be cited as the "Schaghticoke Acknowledgment Repeal Act of 2005"

SEC. 2 REPEAL OF THE FEDERAL ACKNOWLEDGMENT OF THE SCHAGHTICOKE TRIBAL NATION.

(a) FINDINGS.—Congress finds the following:

(1) The Bureau of Indian Affairs should acknowledge petitioning groups as Indian tribes within

the meaning of Federal law only when petitioning groups fully, faithfully, and objectively satisfy each of the 7 mandatory acknowledgment criteria under 25 CFR § 83.7.

(2) The Bureau of Indian Affairs issued a Proposed Finding, a Preliminary decision, dated December 2, 2002, and published in the Federal Register on December 11, 2002 (67 Fed. Reg. 76184), that declined to acknowledge the Schaghticoke Tribal Nation as an Indian tribe, within the meaning of Federal law because the tribe did not satisfy each of the 7 Mandatory criteria under section 83.7 of title 25 Code of Federal Regulation, more particularly:

(A) The Proposed Finding concluded that the Schaghticoke Tribal Nation did riot satisfy criterion 83.7(b), the demonstration of a continuous Community from the first sustained historical contact to the present, because there was "insufficient evidence" to demonstrate that a community existed for 36 years from 1940 to 1967 and from 1996 to the present.

(B) The Proposed. Finding concluded that the Schaghticoke Tribal Nation did not satisfy criterion 83.7(c), the demonstration of continuous political authority and influence within the community, because there was "insufficient evidence" or "no specific evidence" or both to demonstrate that political authority and influence was exercised within the community for 165 years from 1801 to 1875, 1885 to 1967, and 1996 to the present.

(C) The Proposed Finding concluded further concerning criterion 83.7(c) that the State of

Connecticut's continuous relationship with individuals claiming to be Schaghticoke and living on land set aside for them as a reservation did not provide additional evidence during those periods when there was an absence of specific evidence of the exercise of political influence within the group within the meaning of the acknowledgment regulations.

(D) The Proposed Finding raised concerns that the Schaghticoke Tribal Nation's membership list excluded prominent individuals who had been ousted from or refused to be a part of the Schaghticoke Tribal Nation petition, including members of the rival Schaghticoke Indian Tribe, members of the Coggswell family, and former Chief Irving Harris. In addition, the membership list included newly recruited Joseph D. Kilson descendents who had not had any connection with the Schaghticoke group throughout the 20th century.

(3) After further public comment and submissions by the petitioner and interested parties, the Bureau of Indian Affairs issued a Final Determination, dated January 29, 2004 and published in the Federal Register on February 5, 2004 (69 Fed. Reg. 5570), that acknowledged the Schaghticoke Tribal Nation as an Indian tribe within the meaning of Federal law.

(4) The Final Determination reached this positive result only though the following:

(A) Explicit, premeditated manipulation of both the evidence and established acknowledgment standards, as evidenced by the following:

(i) In a briefing Paper dated January 12, 2004, Prepared by the Office of Federal Acknowledgment and submitted to Principal Deputy Assistant Secretary-Indian Affairs Aurene Martin regarding the forthcoming Final Determination, the Office of Federal Acknowledgment requested guidance from the Principal Deputy Assistant Secretary-Indian Affairs on whether the Schaghticoke Tribal Nation should be "acknowledged even though evidence of political influence and authority is absent or insufficient for two substantial historical periods, and if so, on what grounds?".

(ii) In the briefing paper, Office of Federal Acknowledgment staff recommended, and the Principal Deputy Assistant Secretary-Indian Affairs endorsed, an analytic approach that explicitly discarded prior agency precedent and regulations governing the acknowledgment process to overcome the absence and insufficiency of evidence to demonstrate continuous political influence and authority; as the regulations require.

(iii) This approach, according to the briefing paper, "would require a change in how continuous state recognition with a reservation was treated as evidence."

(iv) The briefing paper also acknowledged the possibility of declining acknowledgment of the Schaghticoke Tribal Nation, saying that option "maintains the current interpretations of the regulations and established precedents concerning how continuous tribal existence is demonstrated."

(B) Ignoring agency admissions that "insufficient direct evidence" or "little or no direct evidence" exists to satisfy the political authority criterion for a period of 118 years, as evidenced by the following:

(i) The Bureau of Indian Affairs admits in the Final Determination that "there or no direct evidence to demonstrate political influence within the Schaghticoke between 1892 and 1936" and elsewhere that "there is insufficient direct evidence to demonstrate criterion 83.7(c) between 1892 and 1936"

(iii The Bureau of Indian Affairs admits in the final determination that "there remains little direct evidence concerning political authority or influence among the schaghticoke for this time period [1801—1875]".

(iii) The Bureau of Indian Affairs admits in a January 12, 2004, briefing paper prepared for the Principal Deputy Assistant Secretary-Indian Affairs that "evidence-of political influence and authority [within the Schaghticoke Tribal Nation] is absent or insufficient for two substantial historical periods."

(C) An arbitrary reevaluation and erroneous interpretation of the State's relationship with the Schaghticoke, where the Bureau of Indian-Affairs overturned longstanding judicial precedent and interpretation that it repeatedly relied upon in prior acknowledgment decisions involving New England Indian groups, as evidenced by the following:

(i) The Final Determination acknowledged that in using the State's relationship with the

group as evidence to satisfy the political community and authority criteria, the Bureau of Indian Affairs was reversing its holding in the Proposed Finding, which stated that "a continuous state relationship with a reservation did not provide additional evidence during those periods when there was an absence of specific evidence of the exercise of political influence within the group within the meaning of the acknowledgment regulations."

(ii) To reach the positive result in the Final Determination, the Bureau of Indian Affairs erroneously equated the fact that the State of Connecticut had set aside tracts of land where individuals claiming descent from a tribe that existed in colonial times could live, including providing funds and overseer for these individuals, with the act of recognizing a sovereign entity that has existed as a distinct political community as it is understood under Federal law.

(iii) The Bureau of Indian Affairs used this faulty analysis to fill gaps where, by the agency's admission, "insufficient" or "little or no direct" evidence existed to demonstrate continuous community and political authority.

(iv) The use of the State's relationship with the Schaghticoke group as evidence of continuous political authority specifically subverts the intent of the regulations since the Bureau of Indian Affairs previously considered and rejected the use of such arrangements as evidence because it merely emphasized Indian ancestry, not the existence of tribal political authority;

(v) In the Final Determination acknowledging the Mohegan tribe in Connecticut, the Bureau of Indian Affairs properly interpreted State recognition, declaring that "State recognition is one form of evidence that a group meets criterion (a), but it is not grounds for automatically considering a group to be entitled Federal recognition." In addition, the Bureau of Indian Affairs adhered to this precedent and interpretation of as State relationship in its proposed findings and final determinations concerning the Narrangansett tribe in Rhode Island, the Gay Head Wampanoag tribe in Massachusetts, and the Historic Eastern Pequot and the Golden Hill Paugussett tribes in Connecticut.

(vi) Without the Bureau of Indian Affairs' use of this erroneous interpretation of the State's relationship with the Schaghticoke group to substitute for "insufficient" or absent evidence necessary to satisfy the continuous community and political authority criteria, the Schaghticoke Tribal Nation would not have satisfied these mandatory criteria and would have been denied acknowledgment.

(D) Unprecedented and inaccurate methods to calculate tribal marriage rates, without which the Schaghticoke Tribal Nation would not have reached the 50 percent intra-marriage rate threshold and consequently would not have satisfied the criteria for political authority for a 74 Year period from 1801 to1875 as evidenced by the following:

(i) Under section 82.7(c)(3) Of title 25, Code of Federal Regulations, (commonly known as

the so-called "carry-over" provision), in the absence of direct evidence, a petitioner can satisfy the political authority criterion for a particular period if it demonstrates one of that "at least 50 percent of the marriages in the group are between members of the group," a threshold that demonstrates community for a particular period under section 83.7(b)(2)(ii) of title 25, Code of Federal Regulations:

(ii) Because the Bureau of Indian Affairs admits in the Final Determination that "there remains little direct evidence concerning political authority or influence among the Schaghticoke for this time period [1801 to 1875]," the agency invoked the carry-over provision to demonstrate political authority for this period because it calculated that more than 50 percent of the marriages in the group were between members of the group

(iii) In a filing before the Interior Board of Indian dated December 2, 2004, the Office of the Solicitor, Bureau of Indian Affairs, admitted that the Final Determination used a methodology in calculating and analyzing marriage rates that "is not consistent with prior precedent in calculating rates of marriages under 83.7(b)(2)(ii) and provides no explanation for the inconsistency."

(iv) The Office of the Solicitor states that "previous acknowledgment decisions interpret 83.7(b)(2)(ii) to require that 50 percent of the marriages are between members of the group. In contrast, the Summary on [Schaghticoke Tribal Nation] inadvertently relied on the number of members of the group who married

other members, which results in a higher count".

(v) The Office of the Solicitor also concludes that mathematical errors were made in tabulating marriage rates in the Final Determination that when corrected reduces the rate below 50 percent, regardless whether "marriages" as is customary, or "members" of the group who marry other members," which is unprecedented, is counted,

(vii) Since Schaghticoke Tribal Nation marriage rates do not meet the 50 percent threshold, the carry-over provision is rendered: inoperative.

(viii) Without the carry over provision substitute for insufficient evidence to demonstrate Political authority for the time period from 1801 to 1875, the political authority criterion is not satisfied, and the Bureau of Indian Affairs should have declined Federal acknowledgment in the Final Determination.

(ix) The Office of the Solicitor further advises that during the Interior Board of Indian Appeals request for reconsideration currently under way, the Final Determination "should not, be affirmed on these grounds absent explanation or new evidence."

(E) A fraudulent membership list for the Schaghticoke Tribal Nation, without which the Schaghticoke group could not be acknowledged—a result the office of Federal Acknowledgment within the Bureau of Indian Affairs-calls "undesirable" in internal briefing papers, as evidenced by the following

(i) The Schaghticoke group has experienced intense factional conflict for many years, with the resulting split in the early 1990s between the Schaghticoke Tribal Nation and the Schaghticoke Indian Tribe into two distinct groups with district communities and political processes.

(ii) The January 12, 2004, briefing paper prepared by Office of Federal Acknowledgment staff for the Principal Deputy Assistant Secretary-Indian Affairs states the "Schaghticoke Tribal Nation membership list did not include a substantial portion of the actual social and political community."

(iii) The briefing paper concludes that "the activities of these individuals were an essential part of the evidence for the [Proposed Findings] conclusion that the [Schaghticoke-Tribal Nation] met criterion 83.7(b) [community] and 83.7(c) [political authority] from 1967 to 1996 and their absence was one of the reasons the [Proposed Finding] concluded these criteria were not met from 1996 to the present. After 1996, these individuals either declined to reenroll as the leadership required of all members, or subsequently relinquished membership, because of strong political difference with the current [Schaghticoke Tribal Nation] administration".

(iv) In response to concerns raised in the Proposed Finding, the Schaghticoke Tribal Nation unsuccessfully attempted to purge the Kilson descendents from the membership list and to persuade prominent Schaghticokes,

including Schaghticoke Indian Tribe members, the Coggswells and Irving Harris, to rejoin.

(v) On September 27, 2003, the day before the end of the Schaghticoke Tribal Nation's comment period prior to the issuance of the Final Determination, 15 Schaghticoke Indian Tribe members applied for and were granted membership in the Schaghticoke Tribal Nation. Nine of those 15 signed a letter on September 29, 2003, however, stating that they were not Schghticoke Tribal Nation Members, had no intention of becoming members, and that "[their] signatures were obtained by fraud."

(vi) In the briefing paper, Office of Federal Acknowledgment staff expresses disappointment that these irregularities could undermine the Schaghticoke Tribal Nation's goals, saying "the current status of a long-term pattern of factional conflict may either have the undesirable consequence of negatively determining Schaghticoke's tribal status. . . "

(5) Congress acknowledges that two noted Native American anthropologists retained to advocate for the Schaghticoke Tribal Nation concluded after exhaustive years-long research that the group did not and could not establish continuous community and political authority as required by the acknowledgment regulations, more particularly:

(A) Dr. William Starna, a professor of anthropology and expert in tribal acknowledgment it the State University of New York at Oneonta, who has worked on behalf of tribal petitioners Gay Head Wampanoag, Golden Hill paugussett, and Eastern Pequot in addition to the

Schaghticoke Tribal Nation, concluded in two separate reports, in 1989 and again in 1993, that the Schaghticoke Tribal Nation could not satisfy either the continuous community or political authority and influence criteria.

(B) Dr. Ann McMullen, a professor of anthropology and expert acknowledgment at Brown University, who has worked on behalf of tribal petitioners Mashpee and Paucatuck Eastern Pequot, conducted further research at the request of the Schaghticoke Tribal Nation. In a 1999, report Dr. McMullen affirmed Dr. Starna's conclusions, saying that "too much still rests on Schaghticoke as a piece of Indian land occasionally occupied by Indians and not the focal point for a larger dispersed tribe".

(6) Paragraph (4) demonstrates that the Schaghticoke Tribal Nation does not satisfy each of the seven mandatory criteria for acknowledgment under section 83.7 of title 25, Code of Federal Regulations. If [sic] further demonstrates willful manipulation of both the acknowledgment regulations and existing agency precedent by the Bureau of Indian Affairs

(7) For the reasons described in paragraphs (4) and (6), the Final Determination acknowledging the Schaghticoke Tribal Nation as an Indian tribe within the meaning of Federal law is erroneous and unlawful.

(8) Congress cannot allow the erroneous and unlawful decision of the Bureau of Indian Affairs to acknowledge the Schaghticoke Tribal Nation as an Indian tribe within the meaning of Federal law to stand because of the significant, harmful, and

irreversible effects it would have on neighboring communities more particularly:

(A) A sovereign, federally acknowledged Indian tribe is exempted from a broad range of State laws and regulations, including State and local taxation

(B) A sovereign, federally acknowledged Indian tribe is granted rights under Federal law to engage in casino-style gaming under the Indian Gaming Regulatory Act, and the construction and operation of a Las Vegas-style casino in Western Connecticut would place unbearable burdens on municipalities, on local tax bases and taxpayers, on an aging transportation infrastructure that could not tolerate the volume of traffic such a facility would create.

(C) A sovereign, federally acknowledged Indian tribe has standing in Federal court to pursue land claims litigation on property under the Federal laws commonly known as the "Non-Intercourse Act", claims that threaten landowners' property rights, cloud title in widespread areas, and prevent the sale of real property

(b) PURPOSES—The purposes of the Act are as follows:

(1) To repeal the Bureau of Indian Affairs acknowledgment of the Schaghticoke Tribal Nation as an Indian tribe within the meaning of Federal law.

(2) To correct the unlawful and erroneous decision by the Bureau of Indian Affairs, in violation of federal regulations and contrary to longstanding agency precedent, to acknowledge the Schaghti-

coke Tribal Nation as an Indian tribe within the meaning of Federal law.

(3) To protect the taxpayers and municipalities of the State Connecticut from the undue burdens and violations of sovereignty described in subsection (a)(6).

(c) DEFINITIONS—For the purposes of this Act, the following definitions apply:—

(1) SCHAGHTICOKE TRIBAL NATION—The term "Schaghticoke Tribal Nation" means the Schaghticoke Tribal Nation, a federally recognized Indian tribe based at 33 Elizabeth Street, 4th Floor, Derby, Connecticut, 06148.

(2) FINAL DETERMINATION—The term "Final Determination" means the decision document containing an administrative decision made pursuant to section 83 et seq. of title 25, Code of Federal Regulations Office of Federal Acknowledgment, Bureau of Indian Affairs, dated January 29, 2004, affirmed by Aurene M. Martin, Principal Deputy Assistant Secretary-Indian Affairs, published in the Federal Register on February 5, 2004 (69 Fed. Reg. 5570), that acknowledged the Schaghticoke Tribal Nation as an Indian tribe within the meaning of Federal law

(3) REQUEST FOR RECONSIDERATION—The term "Request for Reconsideration" means the administrative appeal of the Final Determination, initiated by the Attorney General of the State of Connecticut on behalf of the State and Interested Parties pursuant to Section 83.11 of title 25, Code of Federal Regulations, In re Federal Acknowledgment of the Schaghticoke Tribal Nation, Docket

Nos. IBIA 04-83—A, IBIA 04-94—A, IBIA 04-95—A, IBIA 04-96—A, and IBIA 04-97—A.

(d) REPEAL OF THE FEDERAL ACKNOWLEDGMENT OF THE SCHAGHTICOKE TRIBAL NATION.—

(1) The Schaghticoke Tribal Nation is not an Indian tribe within the meaning of Federal law and does not maintain a government-to-government relationship with the United States.

(2) The Final Determination acknowledging the Schaghticoke Tribal Nation as an Indian tribe within the meaning of Federal law, maintaining a government-to-government relationship with the United States, is repealed.

(3) The outcome of the Request for Reconsideration shall have no effect on this Act.

No. 09-1433

In The
Supreme Court of the United States

SCHAGHTICOKE TRIBAL NATION,

Petitioner,

v.

DIRK KEMPTHORNE, Secretary, Department of the Interior; JAMES E. CASON, Associate Deputy Secretary, Department of the Interior; U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT; INTERIOR BOARD OF INDIAN APPEALS; KENT SCHOOL CORPORATION; STATE OF CONNECTICUT; TOWN OF KENT; and THE CONNECTICUT LIGHT AND POWER COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals properly reviewed the petitioner's claim that undue political pressure had influenced a federal administrative agency decision.

CORPORATE DISCLOSURE STATEMENT

Respondent Kent School Corporation discloses that it has no parent corporation, and there is no publicly held company owning 10% or more of the corporation's stock.

Respondent The Connecticut Light and Power Company discloses that 100% of its stock is held by Northeast Utilities, which is a publicly traded Massachusetts Business Trust.

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COUNTER STATEMENT OF THE CASE

This petition arises from an administrative appeal of the Federal respondents' decision that the petitioner Schaghticoke Tribal Nation ("STN") failed to satisfy two of the mandatory acknowledgment criteria necessary for federal tribal acknowledgment. The denial of the STN's federal acknowledgment petition came in a Reconsidered Final Determination ("RFD") issued October 11, 2005 by Associate Deputy Secretary James Cason. The original final determination ("FD") granting federal acknowledgment to the STN was vacated as deeply flawed by the Interior Board of Indian Appeals ("IBIA"), an independent board of administrative law judges. The RFD, following the directions of the IBIA on reconsideration, properly concluded that those significant deficiencies required that the STN's petition for acknowledgment be denied.

Because the RFD was amply supported by the record evidence, the STN's appeal was based to a very large degree on extra-record evidence. In particular, the STN attempted to argue that the RFD was the result of improper political influence. The record and the evidence, however, simply do not support the claim. It was the FD that was the anomaly in the process, and the independent IBIA concluded that it was inconsistent with the acknowledgment regulations. Despite having been permitted to take extraordinary discovery, including the depositions of several high level Interior Department officials, the

STN fell far short of sustaining its burden to set aside the agency's decision on the basis of improper influence.

As grounds for its petition, the STN maintains that a conflict among the Courts of Appeals exists as to the proper standard for addressing a claim of improper political influence. STN Pet., at 34-37. As demonstrated below, no such conflict exists, and certiorari is simply not warranted in this case.

This Opposition is submitted on behalf of the respondents State of Connecticut, Kent School Corporation, Town of Kent, and The Connecticut Light and Power Company (collectively, "State Respondents").

A. Federal Tribal Acknowledgment

Federal acknowledgment creates a government-to-government relationship between the United States and an Indian tribe. A federally acknowledged Indian tribe is entitled to the immunities and privileges of a quasi-sovereign entity and to the benefits and services available to Indian tribes from the federal government. 25 C.F.R. § 83.2.

The standards and procedures governing acknowledgment petitions are set forth in the Department's regulations at 25 C.F.R. Part 83 and are predicated on longstanding principles relating to tribal status. The acknowledgment regulations are "intended to apply to groups that can establish

a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present." *Id.*, § 83.3(a).

The acknowledgment criteria set forth precise standards and the types of evidence necessary for federal tribal acknowledgment. In particular, under the acknowledgement regulations, criterion 83.7(b) requires proof that "a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present." *Id.*, § 83.7(b). Criterion 83.7(c) requires proof that "[t]he petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present." 25 C.F.R. § 83.7(c) (emphasis added). Both the community and political authority criteria must be demonstrated on a "substantially continuous basis." 25 C.F.R. § 83.6(e).

B. Because of Massive Gaps in the STN's Evidence, the Proposed Finding Proposed to Deny Acknowledgement.

On December 5, 2002, then-Assistant Secretary Neal McCaleb issued a proposed finding ("PF" or "STN PF") that the STN should be denied federal acknowledgment. The PF concluded that the STN had failed to satisfy the requirements of criterion (b)—the continual existence of a distinct community—from 1940 to 1967 and from 1996 to the present. FD, at 18-19. The PF used state recognition

as "additional evidence" to the otherwise limited direct evidence of community for 1900 to 1940. *Id.* It further found that the STN lacked evidence satisfying criterion (c)—the maintenance of political authority and influence—from 1801 to 1875, 1885 to 1967, and 1996 to the present. *Id.* at 62. There simply was no evidence of political leadership or authority from 1801 to 1875. *Id.* What little evidence existed for the period 1885 to 1967 did not demonstrate the exercise of political authority or influence within the meaning of the regulations, and state recognition did not add to this insufficient evidence. *Id.* at 63.

C. The Final Determination Wrongly Used State Recognition and Miscalculated Marriage Rates to Grant Recognition.

On January 29, 2004, Principal Deputy Assistant Secretary—Indian Affairs Aurene Martin issued the Final Determination ("FD" or "STN FD"). In a complete about-face, the FD acknowledged the STN as a federal Indian tribe.

The FD reached this result only through a manipulation of the evidence and the acknowledgment standards. Like the PF, the FD concluded that there was little or no evidence of political authority or influence for most of the nineteenth and twentieth centuries. The scant evidence that the STN had submitted to address the deficiencies for the period of 1801 to 1875 was readily dismissed as "provid[ing] no specific information

in regard to political authority or influence." FD, at 85-86. For the period of 1892 to 1936, the FD expressly rejected each and every argument and piece of evidence on political authority the STN offered. *Id.* at 91-107. For other periods, the FD acknowledged that the direct evidence was alone insufficient. *Id.* at 118-23. Yet despite these lengthy periods of woefully inadequate evidence, the FD reached the conclusion that the STN should receive federal acknowledgment.

To reach this conclusion, among other things, the FD wrongly concluded that both criteria (b) and (c) were satisfied from 1800 to 1820 and 1840 to 1870 on the basis of an analysis that purports to show that Schaghticoke members intermarried at rates in excess of 50 percent.[1] STN FD, at 26-39. Rather than basing its calculations on the percentage of *marriages* that were between Schaghticoke members, the FD used a so-called "endogamy" analysis based on the percentage of *individuals* who married other Schaghticoke. *Id.* The effect of this error was to inflate the rate by counting each member in a marriage rather than counting the marriage itself.

Moreover, the FD "reevaluated" the use of the State's historical relationship with the Schaghticoke, referred to as "state recognition," to make up for the

[1] The acknowledgment regulations permit the conclusive presumption that both community and political authority existed when marriage rates exceed a 50 percent threshold. 25 C.F.R. §§ 83.7(b)(2)(ii), 83.7(c)(3).

gaps in the evidence that could not otherwise be explained away. In direct contradiction to existing precedent, the FD concluded that the State's "implicit" recognition of a distinct political body could be used to establish the existence of political authority even when there was no evidence of actual political authority or influence between tribal leaders and members. FD, at 118-20.

The degree to which the FD manipulated the acknowledgment process in the misuse of state recognition to compensate for the lack of required evidence was revealed starkly in a memorandum prepared by the OFA staff in preparation for the FD. This "Schaghticoke Briefing Paper" dated January 12, 2004, sought guidance in particular on the question: "*Should the petitioner be acknowledged even though evidence of political influence and authority is absent or insufficient for two substantial historical periods, and if so, on what grounds?*" OFA Briefing Paper, at 1 (italics in original). After noting that there was "little or no evidence" of political influence or authority for large periods of the nineteenth and early twentieth centuries, OFA stated: "*If applied as it was in the Schaghticoke PF, the weight of continuous state recognition with a reservation would not provide additional evidence to demonstrate that criterion 83.7(c) (political influence) has been met for this time period.*" *Id.* (emphasis added). OFA then offered four options: (1) acknowledge the STN despite the absence of evidence on the basis of state recognition; (2) decline to acknowledge the STN

"*based on the regulations and existing precedent*;" (3) acknowledge the STN outside the regulations; or (4) decline to acknowledge the STN but support legislative recognition. *Id.* at 2-3 (emphasis added). The OFA Briefing Paper conceded that the first option required a change from past precedent on how state recognition could be used as evidence and that the second option "*maintains the current interpretations of the regulations and established precedents concerning how continuous tribal existence is demonstrated.*" *Id.* at 3 (emphasis added). Despite reaching that conclusion, OFA nonetheless recommended the first option without explaining how that result was consistent with the regulations or why it should depart from past precedent.

From the FD and the OFA Briefing Paper, several aspects of the FD's disregard for the acknowledgment regulations and precedent became apparent: First, it is plain in the FD that the STN lacked the evidence to satisfy the criteria in the absence of state recognition as a substitute. Second, a denial of acknowledgment was the only option consistent with prior precedent and the regulations. Third, to acknowledge the STN would require a departure from prior precedent and a change in how state recognition could be used. Fourth, no justification was available for the departure from precedent and the regulations except that it was necessary to accomplish the acknowledgment of this petitioner.

D. The IBIA Vacated the FD, Concluding That the FD Misused State Recognition to Make Up for the Lack of Evidence of Political Authority and Community.

The State Respondents timely filed a request for reconsideration with the Interior Board of Indian Appeals ("IBIA").[2] Among other things, the State Respondents claimed that (1) the FD erroneously used the State's relationship with the Schaghticoke as a substitute for otherwise wholly absent or insufficient evidence of community and political authority; and (2) Schaghticoke marriage rates were improperly calculated and used to satisfy criteria (b) and (c) for extensive periods, contrary to the regulations and prior precedent.

After the briefing was concluded, OFA filed a "Supplemental Transmittal" with the IBIA on the marriage rate issue. Having reviewed the State Respondents' claims in their request for reconsideration and the STN's response, OFA stated in the Supplemental Transmittal that the FD "is not consistent with prior [acknowledgment] precedent in calculating the rates of marriages under [25 C.F.R. §] 83.7(b)(2)(ii), provides no explanation for the inconsistency[, and] there is no evidence that the [FD]

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[2] Under the acknowledgment regulations, a petitioner or interested party may seek independent review of a final determination by filing a request for reconsideration with the IBIA. 25 C.F.R. § 83.11(d).

intended to deviate from precedent." Supp. Trans., at 2.

In a decision dated May 12, 2005, the IBIA vacated the FD and remanded the STN petition for further consideration. Following its decision in *In re Federal Acknowledgment of Historical Eastern Pequot Tribe*, 41 IBIA 1 (2005), issued the same day, the IBIA concluded that the State's relationship with the Schaghticoke "is not reliable or probative evidence for demonstrating the actual existence of community or political influence or authority within that group." *In re Federal Acknowledgment of Schaghticoke Tribal Nation*, 41 IBIA 30, 34 (2005). In addressing the use of state recognition as evidence for criteria (b) and (c) in *Historical Eastern Pequot*, the IBIA stated that, even assuming that the State in fact implicitly recognized a distinct political body, that alone did not demonstrate the existence of a community or the exercise of political authority. 41 IBIA at 18. Such recognition "would need to be more than 'implicit,' and would need to be expressed in some way that reflected the *actual or likely existence* of those [community] interactions and social relationships." *Id.* (emphasis added).

In other words, the mere existence of some form of relationship between the State and the group itself is not probative of community or political authority. Instead, the agency "must articulate more specifically how the State's actions toward the group during the relevant time period(s) reflected or indicated the likelihood of community and political influence or

authority within a single group." *Id.* at 21. If it could not do so, criteria (b) and (c) could not be satisfied. *Id.*

The IBIA concluded that the way the FD had used state recognition was inconsistent with the acknowledgment regulations. If state recognition was to be used as evidence, the IBIA directed, evidence of the State's relationship with the Schaghticoke would have to demonstrate that the Schaghticoke had existed as a community and had exercised political authority. The mere fact that the State had some largely unarticulated relationship with the Schaghticoke or its members was not enough to fill the gaps in the evidence. Rather than offering state recognition as demonstrating the existence of community or political authority, "the FD uses state recognition as a nonspecific catch-all 'additional evidence' to tip the scales for finding that criteria (b) and (c) are satisfied." *Historical Eastern Pequot,* 41 IBIA at 21 (emphasis added). This use of state recognition was contrary to the acknowledgment regulations. *STN*, 41 IBIA at 34.

The IBIA vacated the STN FD and remanded the matter to the Assistant Secretary for further consideration. The STN has not challenged any part of the IBIA's decision.

E. Properly Applying the Criteria and the Directions of the IBIA, the Reconsidered Final Determination Denied Recognition.

On October 11, 2005, Associate Deputy Secretary James E. Cason issued the Reconsidered Final Determination ("RFD"), denying the STN petition. Following the IBIA's directions that state recognition in and of itself could not be used as evidence of community or political authority, the RFD evaluated the State's relationship with the Schaghticoke and concluded that "it does not provide evidence for political influence or authority within the Schaghticoke, and the State did not formulate its policies towards the Schaghticoke based on the recognition of the existence of bilateral political relations within the Schaghticoke." RFD, at 58.

The RFD therefore concluded, consistent with the PF issued nearly three years earlier, that there was insufficient evidence to satisfy criterion (b) (community) from 1920 to 1967 and after 1996. RFD, at 45. It further found that there was insufficient evidence to satisfy criterion (c) (political authority) from 1801 to 1875, 1885 to 1967, and after 1996. *Id.* at 58, 62. The RFD also analyzed marriage rates within the Schaghticoke during the nineteenth century, applying the proper methodology, and concluded that marriage rates never exceeded the 50 percent threshold required to satisfy criteria (b) and (c). *Id.* at 36. Thus, after properly calculating Schaghticoke marriage rates for the nineteenth century and after eliminating the misuse of state

recognition, the RFD concluded that the evidence failed to demonstrate the STN had existed as a community for approximately five decades and failed to demonstrate it had exercised political authority or influence for most of the last two centuries. Under a proper application of the acknowledgment standards, the STN's petition was decidedly deficient.

In reexamining the State's relationship under the standards directed by the IBIA, the RFD concluded that the State's relationship was not explicitly or implicitly based on recognition of a government-to-government relationship with the Schaghticoke or on the existence of bilateral political relations within the group. RFD, at 48. It further found that the State's relationship evolved "in often contradictory and *ad hoc* ways, in response to short-term issues of immediate concern, or based on previous legislative actions that may have been out of date or in need of revision." *Id.* at 48-49. Applying the standards articulated by the IBIA, the RFD found that nothing in the State relationship with the Schaghticoke could serve as evidence of the actual exercise of political authority or influence within the group. *Id.* at 48-50.

In the absence of the unlawful use of state recognition, both the FD and the RFD had found that the other evidence offered by the STN of political authority or influence was insufficient. FD, at 91-124; RFD, at 52-58. The STN has not challenged these well-supported findings.

F. The District Court Proceedings

The STN appealed the RFD to the District Court by a petition for review pursuant to the APA, 5 U.S.C. § 702 *et seq.* The STN's petition for review alleged, among other things, that the RFD was influenced by improper political and congressional interference.

Although APA appeals are ordinarily limited to a review of the administrative record, the District Court did permit the STN to conduct broad and unusual discovery. In particular, the District Court permitted the depositions of former Interior Secretary Gale Norton; Associate Deputy Secretary James Cason, the official who issued the RFD; Lee Fleming, the Director of OFA; and David Bernhardt, former deputy chief of staff to Secretary Norton.

The parties filed cross-motions for summary judgment. On August 22, 2008, the District Court granted summary judgment in favor of the respondents and denied the STN's motion for summary judgment. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389 (D. Conn. 2008). The District Court concluded that "the evidence presented by the STN does not show that the legislative activity *actually* affected the outcome on the merits" and that "[n]othing suggests that the actual decision maker was impacted by the political pressures exerted by state and federal legislators or their surrogates." *Id.* at 412. As to the merits, the District Court determined (a) that the RFD "came to a researched and well-reasoned conclusion regarding

the state recognition issue" that properly followed the IBIA's ruling, *id.* at 413-14; and (b) that the RFD's marriage rate analysis was proper and resulted in "an informed, reasoned decision," *id.* at 416-17.

G. Court of Appeals

The STN appealed to the U.S. Court of Appeals for the Second Circuit. It argued, among other things, that its claim of improper political influence should be judged under an appearance of impropriety standard. The Court of Appeals affirmed the District Court in a per curiam decision. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132 (2d Cir. 2009).

The Court of Appeals rejected the STN's argument that an appearance of bias standard applied, noting that the standard for a claim of improper political influence was "clear." *Id.* at 134 n.1. Such a claim must demonstrate that "'the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute.'" *Id.* at 134 (quoting *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984)).

Applying this standard, the Court of Appeals upheld the District Court's conclusion that the STN's evidence did not support a claim of improper influence. It emphasized that "the Interior Department officials uniformly testified in depositions that they were not influenced by the

political clamor" and that there was no evidence that pressure was exerted on the actual decision maker, Cason. *Id.*

II. The STN's Evidence of Alleged Improper Influence.

The STN asserts that its petition is not "factbound." STN Pet., at 8. Ironically, it then proceeds with an extensive factual discussion to demonstrate what it believes is the evidence supporting its claim of improper political influence. Thus, it is necessary to review what the alleged evidence is to see how far short it falls from establishing the claim.

There is no question that the FD was highly controversial and sparked great concern among Connecticut's public officials. Federal acknowledgement of an Indian tribe can have a serious and significant impact on a state, its municipalities and its citizens. It creates a quasi-sovereign entity, removing the tribe and potentially significant areas of land from the reach of certain aspects of state and local authority. Among other things, federally acknowledged Indian tribes have immunity from suit, *see Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); may pursue land claims under federal law, 25 U.S.C. § 177; can seek to conduct casino gaming, 25 U.S.C. § 2701 *et seq.*; and are exempted broadly from much of state and local taxation and regulatory authority, *see Oklahoma Tax Comm'n v. Chickasaw*

Nation, 515 U.S. 450 (1995). Given the seriousness of the matter for all involved and the evidence that came to light about the FD, the public expression of concern was entirely ordinary, justified and appropriate. The decision in the FD to recognize the STN was a sudden and unsupported reversal of the earlier PF and was inconsistent with the evidence in the record and contrary to the acknowledgment regulations. Connecticut's public officials were quite right to express their objection and to suspect things were seriously amiss.

The District Court afforded the STN an extraordinary opportunity to seek extra-record discovery, including the depositions of key Interior officials. Despite this discovery, the STN did not adduce any evidence of undue or improper influence on the relevant decision makers. Indeed, the uncontroverted testimony of the Interior Department officials deposed by the STN is that they were not influenced by any of the alleged political pressure.

1. The Congressional Meetings With Secretary Norton Do Not Constitute Improper Influence and Did Not Create an Appearance of Bias.

The STN lists a number of meetings and other communications that it contends demonstrate either an appearance of impropriety or actual improper influence. STN Pet., at 18-19, 20, 24-26. The STN's characterization does not survive scrutiny. In these

various meetings and communications, members of the Connecticut congressional delegation and others expressed their serious concerns with the acknowledgment process in general and the FD in particular. There is nothing improper or out of ordinary for such communications to take place. Moreover, the Interior officials uniformly testified that they were not influenced by these criticisms and communications.

In the Spring of 2004, while the Intervenor's request for reconsideration was pending before the IBIA, three meetings took place between members of Congress and Secretary Norton. Two of the meetings Secretary Norton described as "straightforward" and "routine." Norton Dep., at 105-09, 175-78. At a March 30, 2004 meeting, attended by Representatives Shay, Johnson and Simmons of Connecticut and Representative Wolf of Virginia, Congressman Wolf threatened to tell the President that Norton should be fired. *Id.* at 167-68. Secretary Norton testified that she "did not lose any sleep over the threat." *Id.* at 168-69. Moreover, other Interior Department officials, including the actual decision maker Cason, testified that no one told them about the threat and that they knew little or nothing about the meetings. Cason Dep., at 34-39, 53-54; Fleming Dep., at 65-67.

Most importantly, each of the Interior officials testified that none of the congressional criticisms had any influence or effect on the RFD. Norton Dep., at 112, 183, 261; Cason Dep., at 91-92; Fleming Dep., at 168-75, 190-91. Although they were all aware that the

FD had been controversial and that there were strong expressions of concern by the Connecticut congressional delegation and others, such controversy was not unusual, and there is nothing in any of their testimonies to suggest that they were in any way improperly influenced by it. Norton Dep., at 183; Cason Dep., at 67-68; Fleming Dep., at 43-45, 70-71, 92-93, 175.

2. Congressional Hearings and Proposed Legislation Were Not Improper and Did Not Create the Appearance of Improper Political Influence.

The STN points to three congressional hearings as causing undue pressure on the agency. STN Pet., at 19. These actions were entirely legitimate and unremarkable congressional activities. Moreover, the Interior Department officials testified in depositions taken by the STN that none of these actions had any influence over the decision making resulting in the RFD.

Three hearings were held by various House and Senate committees on March 31, 2004, May 5, 2005, and May 11, 2005. The subject matter of the hearings involved the federal acknowledgment process, and at each the STN FD was addressed.[3] These hearings

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[3] *See Betting on Transparency: Toward Fairness and Integrity in the Interior Department's Tribal Recognition Process*, Hearing before the House Committee on Government Reform

(Continued on following page)

were appropriate exercises of legitimate legislative authority. Congress cannot reasonably be barred from conducting hearings merely because the inquiry touches on or arises from an administrative decision. *See ATX, Inc. v. United States Dept. of Transportation*, 41 F.3d 1522, 1527-28 (D.C. Cir. 1994). Indeed, the object of the hearing was to evaluate whether the acknowledgment process was, on a broad scale, being conducted in violation of the governing regulations. The BIA, like most any other federal agency, is no stranger to even strong criticism. To suggest that public criticism raised at an otherwise legitimate congressional hearing somehow intimidated the BIA into submission is completely without support.

Similarly, the introduction of a bill by Congresswoman Johnson to overturn the STN decision cannot possibly be evidence of impermissible congressional pressure. STN Pet., at 26-27. It is beyond question that a member of Congress has the authority to introduce legislation on such a topic without somehow upending and invalidating an administrative decision merely by doing so.

108th Cong., 2d Sess. (May 5, 2004); *Federal Recognition and Acknowledgment Process by the Bureau of Indian Affairs*, Hearing before the House Committee on Resources, 108th Cong., 2d Sess. (Mar. 31, 2004); *Oversight Hearing on Federal Recognition of Indian Tribes*, Hearing before the Senate Committee on Indian Affairs, 109th Cong., 1st Sess. (May 11, 2005).

The STN also unpersuasively relies on an attempt by Congresswoman Johnson to meet with Interior officials to submit the results of a survey of her constituents about casino gaming in Connecticut. *Id.* at 20. The meeting never actually took place, Cason testified that he knew nothing about it, and Fleming properly notified others that the survey results were not to be considered. Cason Dep., at 93; Fleming Dep., at 106-12. Far from proving impermissible congressional interference, this reflects that the Federal respondents were not influenced by political pressures and that they understood these acts as not affecting their decision making.

The Interior officials testified unequivocally that none of these congressional activities had any impact on the decision making process that produced the RFD. Cason Dep., at 40-41, 47-49; Norton Dep., at 187, 190-91, 212, 245; Bernhardt Dep., at 119-21; Fleming Dep., at 170-73. Indeed, Associate Deputy Secretary Cason, the actual decision maker, testified that he could not even recall being told about them. Cason Dep., at 40-41, 47-49.

3. The STN's Remaining Contentions of Improper Influence Are Unsupported.

The STN cites one insignificant instance as suggesting some impropriety as to the IBIA. STN Pet., at 20. This is critically fatal to its claim inasmuch as the IBIA's decision vacating the FD was the salient moment in this litigation. *See* § E *supra*.

In a February 10, 2005 letter to the Chief Administrative Judge of the IBIA, Representatives Johnson, Shays and Simmons inquired of the status of the matter then pending before the IBIA, expressing their hope for an impartial review consistent with the acknowledgment regulations and their view that the FD was unlawful and erroneous. Letter dated Feb. 10, 2005 from Reps. Johnson, Shays & Simmons. Although the letter was not served on the parties, the IBIA responded appropriately.[4] The STN in fact filed an extensive response to the Congressmen's letter. Thus, any possible prejudice that could have resulted from the communication was cured. Plainly, this cannot support a claim of improper influence, appearance or otherwise, as to the IBIA.

The STN also notes a communication made by Connecticut Attorney General Blumenthal in which he hand delivered a letter to Secretary Norton on May 17, 2004, expressing concern about the FD. STN Pet., at 23-24. The letter was served on the other parties following its delivery to the Secretary. The communication was deemed to technically violate the

[4] The Chief Administrative Judge made the letter part of the record, provided copies of the letter to the parties, and by separate order provided the parties with the opportunity to file responses to the letter. Letter of Chief Administrative Judge Linscheid dated Feb. 22, 2005. *See* 43 C.F.R. § 4.27(b)(1) (providing that *ex parte* communications on the merits should be made part of the record and parties given an opportunity to respond).

District Court's order on communications with Interior officials that required notice to the parties of any meeting with those officials. The District Court addressed the violation by amending its order to clarify that notice must be provided prior to the communication, a requirement not contained in the original order. It hardly demonstrates impropriety or its appearance in the issuance of the RFD.

Finally, the STN quixotically references an ex parte communication between District Court Judge Dorsey and Connecticut Governor Rell. STN Pet., at 27-29. The STN concedes that "the letter [does] not furnish independent grounds for relief on appeal." *Id.* at 28. Apparently, it is offered up solely to show why the STN "might feel" that there was an appearance of impropriety. *Id.* at 29. How this communication demonstrates that Interior Department officials were improperly pressured is simply not explained. It is in fact irrelevant.

REASONS FOR DENYING THE WRIT

The STN's petition should be denied. It fails to demonstrate the existence of a conflict among the Circuits as to the appropriate standard to be applied to claims of improper political influence in agency decision making. Moreover, the highly unique context in which this matter arose and was decided counsels against granting the petition.

A. There Is No Conflict Among the Circuits Regarding the Standard to Be Applied to Improper Influence Claims Requiring This Court's Resolution.

The STN claims that certiorari is warranted to resolve a conflict between the Circuits as to the standard to be applied to a claim of improper political influence. STN Pet., at 36. It suggests that the Second Circuit in this case applied a standard that fails to take into consideration the differences between quasi-judicial and quasi-legislative administrative proceedings. It further contends that other Circuits have "explicitly or implicitly recognized" such differences. *Id.* at 34-35. What the STN pointedly fails to do, however, is explain what the conflict actually is in the standards that have been applied for political influence claims. In fact, a review of the cases it cites to support its claim of a split among the Circuits reveals that no such conflict exists.

The courts of appeals have consistently applied a standard—in both quasi-judicial and quasi-legislative proceedings—that requires a showing that political pressure actually caused an agency decision maker to base its decision on factors that are not relevant under the applicable law. *Press Broadcasting Co., Inc. v. FCC*, 59 F.3d 1365, 1369 (D.C. Cir. 1995); *Radio Ass'n on Defending Airwave Rights, Inc. v. United States Dept. of Transportation*, 47 F.3d 794, 807 (6th Cir.), *cert. denied*, 516 U.S 811 (1995); *ATX, Inc. v. United States Dept. of Transportation*, 41 F.3d 1522, 1528 (D.C. Cir. 1994); *Chemung County v. Dole*, 804

F.2d 216, 222 (2d Cir. 1986); *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984); *Peter Kiewet Sons' Co. v. United States Army Corps of Eng'rs*, 714 F.2d 163, 170-71 (D.C. Cir. 1983). Both the District Court and the Court of Appeals properly evaluated the STN's claims under this standard. 587 F.3d at 134; 587 F. Supp. 2d at 409-10. Nonetheless, the STN argues that the appropriate standard for reviewing its claim of improper political influence is an "appearance of bias" or "appearance of impropriety" standard. Specifically, it contends that an appearance of impropriety, without any evidence that political pressure actually improperly influenced the agency's decision, should be enough to invalidate the decision. STN Pet., at 36-37.

The courts of appeals have developed a standard for political influence claims that "focus[es] on the nexus between the pressure and the actual decision maker." *ATX, Inc.*, 41 F.3d at 1528. "The test is whether 'extraneous factors intruded into the calculus of consideration' of the individual decision maker." *Id.* at 1527 (quoting *Kiewit*, 714 F.2d at 170). An action or communication by members of Congress or others, including contemporaneous hearings or introduction of legislation, is not impermissible interference unless that interference reaches the agency decision maker and results in that decision maker using "extraneous factors"—that is, factors other than those relevant under the applicable law—to make its decision. *Id.* at 1527-28. Thus, the proper inquiry focuses not on the alleged improper

communication or activity in the abstract, but rather on whether the conduct caused the decision maker to make its decision on impermissible grounds.

The cases the STN cites do not demonstrate a divergence on the proper standard among the Circuits. STN Pet., at 34-35. In particular, the STN relies on two early cases involving improper influence claims—*Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966),[5] and *D.C. Federation of Civic Assns. v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972)—that it argues stand for the proposition that in quasi-judicial administrative proceedings the mere appearance of impropriety is sufficient to invalidate an otherwise valid agency decision. In doing so, however, the STN ignores several key subsequent cases that developed the standard for judicial evaluation of improper influence claims.

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[5] *Pillsbury* involved congressional hearings in which an agency decision maker was sharply questioned about the decision while it was pending with that decision maker. *Pillsbury*, 354 F.2d at 964. Almost all, and certainly the most significant, of the alleged improper conduct in this case directed at Interior Department officials by members of Congress or others occurred while the matter was pending before the IBIA and not the Secretary, the Assistant Secretary, Associate Deputy Secretary, or OFA. For this reason alone, *Pillsbury* does not apply to this case. *Kiewit*, 714 F.2d at 170 n.47; *Koniag, Inc. v. Andrus*, 580 F.2d 601, 610 (D.C. Cir.) (*Pillsbury* does not apply where agency representative not called on to prejudge any pending matter), *cert. denied*, 439 U.S. 1052 (1978).

In *Peter Kiewit Sons' Co. v. United States Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983) ("*Kiewit*"), which the STN incorrectly cites as a case applying the appearance of impropriety standard, STN Pet., at 35 n.18, the court explicitly discussed both *Pillsbury* and *D.C. Federation*. In *Kiewit*, the court acknowledged that the *Pillsbury* court emphasized that the appearance of impartiality was the "*sine qua non* of American *judicial* justice." *Id.* at 170 (quoting *Pillsbury*, 354 F.2d at 964). Nonetheless, the *Kiewit* court noted that "*Pillsbury* also emphasized the effect of communications on the 'decisional process' of the adjudicators." *Id.* (quoting *Pillsbury*, 354 F.2d at 954). Therefore, *Kiewit* concluded, "[p]ressure must be evaluated in the context of a concrete decision process." *Id.* Similarly, the *Kiewit* court stated that in *D.C. Federation* the court held that an agency decision maker could not consider congressional threats in reaching a decision. *Id.* at 169. Although *D.C. Federation* did not involve an agency adjudication, the *D.C. Federation* court, in dicta, said that if it had involved a quasi-judicial decision, such a decision could have been invalidated solely on the basis of an appearance of bias or pressure. The *Kiewit* court expressly disavowed such a standard. Instead, the *Kiewit* court explained:

> In either [the quasi-legislative or quasi-adjudicative] context, the proper focus is not on the congressional communications in the abstract, but rather upon the relation between the communications and the adjudicator's decision making process. A

> court must consider the decision maker's input, not the legislator's output. *The test is whether 'extraneous factors intruded into the calculus of considerations' of the individual decision maker.*

Id. at 169-70 (quoting *D.C. Federation*, 459 F.2d at 1246) (emphasis added)).

Similarly, in *ATX, Inc. v. United States Dept. of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994), which did involve an administrative adjudication, the court expressly reaffirmed the extraneous factor standard articulated in *Kiewit* as well as *Kiewit*'s explanation of the *Pillsbury* and *D.C. Federation* cases. *Id.* at 1527. Although the court in *ATX* acknowledged that "the appearance of bias or pressure may be no less objectionable than the reality," *id.* (quoting *D.C. Federation*, 459 F.2d at 1246-47), it nonetheless emphasized that an agency adjudication will not be set aside unless the political influence caused the actual decision maker to base its decision on factors other than those provided by governing law. *Id.* Although the STN cites both of these cases in support of its argument for an appearance of impropriety standard, *see* STN Pet., at 35-36 n.18, it conveniently ignores what those cases say about *Pillsbury* and *D.C. Federation* and their clear application of the extraneous factor standard.

The remaining cases that the STN relies on to demonstrate a split among the Circuits either simply do not support the proposition for which they are cited or in fact applied or are entirely consistent with

the extraneous factor standard. *Esso Standard Oil Co. (Puerto Rico) v. Lopez-Freyetes*, 522 F.3d 136, 146-48 (1st Cir. 2008) (finding due process violation based on agency structure that was "severely biased" and other evidence of actual bias); *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 611 (3rd Cir. 1977) (although noting that "courts must not tolerate undue legislative interference with an administrative agency's adjudicative functions," court concluded no such interference because evidence showed agency's decision was not actually the result of congressional pressure); *Monieson v. CFTC*, 996 F.2d 852, 865 (7th Cir. 1993) (finding only that there was no congressional interference without any discussion of an appearance standard), *cert. denied*, 434 U.S. 1062 (1978); *State of California ex rel State Water Resources Control Bd. v. FERC*, 966 F.2d 1541, 1552 (9th Cir. 1992) (finding "the record does not disclose that [the agency's] decision was the result of undue influence"); *Portland Audubon Soc'y v. Endangered Species Committee*, 984 F.2d 1534 (9th Cir. 1993) (holding only that members of White House staff were subject to ex parte communications prohibition under APA); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 548 (11th Cir. 1996) (applying standard articulated in *ATX*, 41 F.3d at 1527).

In sum, there is no conflict among the Circuits as to the standard to be applied to improper political influence claims requiring a resolution by the Court.

B. The Unique Context of the Case Weighs Against Granting the Petition.

In attempting to persuade this Court to grant certiorari, the STN suggests that this question presented is not "uniquely 'Indian,'" but rather one that any litigant before an administrative agency could face. STN Pet., at 5. It is plain from the record, however, that the context in which the issue has arisen in this case is extraordinarily unique. Even assuming there were other grounds supporting a grant of the petition, which there are not, this case provides an inappropriate vehicle for this Court to reach the question.

First, it is highly noteworthy that the STN, both at the Court of Appeals and before this Court, has abandoned any claim as to the merits of the RFD's denial of federal tribal acknowledgment. As the District Court concluded as to the merits, the RFD was detailed, well reasoned, and entirely consistent with the appropriate legal standards governing acknowledgment petitions. 587 F. Supp. 2d at 413-18. Indeed, once the critical legal question as to the proper use of state recognition was resolved adversely to the STN by the independent administrative law judges of the IBIA, the resolution of the STN's petition for acknowledgment was not even a close call. Massive gaps in its evidence as to the key criteria of community and political authority demanded denial of the acknowledgment petition.

Second, it was in fact the IBIA's decision—rejecting the FD's misuse of state recognition to make up for the massive evidentiary deficiencies—that was the critical decision in the administrative process. Nothing in the record comes even close to establishing that the IBIA was improperly influenced or that its decision was infected by an appearance of bias. Instead, the record reveals that it was the FD that was the anomaly in the proceedings. Against this background, even if the RFD were to be judged against an appearance of bias standard, the STN's claims would fail.

Given the highly unique nature of the proceedings, certiorari is not warranted in this case.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

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IN THE

Supreme Court of the United States

SCHAGHTICOKE TRIBAL NATION,
Petitioner-Appellant,

v.

DIRK KEMPTHORNE, Secretary, Department of the Interior, JAMES E. CASON, Associate Deputy Secretary, Department of the Interior, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, and INTERIOR BOARD OF INDIAN APPEALS,
Respondents-Appellees.

THE KENT SCHOOL CORPORATION, STATE OF CONNECTICUT, TOWN OF KENT, and THE CONNECTICUT LIGHT AND POWER COMPANY,
Intervenors-Appellees.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

No. 09-1433

SCHAGHTICOKE TRIBAL NATION,
Petitioner-Appellant,

v.

DIRK KEMPTHORNE, Secretary, Department of the Interior, JAMES E. CASON, Associate Deputy Secretary, Department of the Interior, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, and INTERIOR BOARD OF INDIAN APPEALS,
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THE KENT SCHOOL CORPORATION, STATE OF CONNECTICUT, TOWN OF KENT, and THE CONNECTICUT LIGHT AND POWER COMPANY,
Intervenors-Appellees.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

The central proposition of the Petition for Certiorari is that Petitioner has a Federal Due Process right to have its claim (that undue political influence affected an administrative adjudicative decision) reviewed under a particular legal standard (the appearance of bias or impropriety). Notably, the

question presented does not involve a lower court's *application* of a settled standard, but rather involves a lower court's *refusal to apply* the appearance of bias standard in quasi-judicial proceedings.

A. There is a Clear Conflict Among the Courts of Appeals

It is significant that Respondents do not take issue with Petitioner's predicate assertion that the tribal acknowledgment process is an adjudicative (quasi-judicial) process. *See* Pet. for Cert. 32-33. Respondents contend, however, that "no such conflict exists" among the Circuit Courts of Appeals with respect to the standard for reviewing claims of undue political influence on adjudicative proceedings. *See* Brief in Opposition 2, 23.

As a threshold matter, the Respondents have a crabbed view of what constitutes a "conflict." Petitioner maintains that there is a direct conflict between the decision of the Court of Appeals below (which refused to "broaden" the Second Circuit's "actually influenced" standard for evaluating a claim of undue political influence, *see* App. to Pet. for Cert. 108a n.1), and decisions of other Circuits that have evaluated such claims under an "appearance of bias" standard. *See* discussion *infra*. But even if no "direct" conflict existed, a grant of certiorari would be warranted because of the "divergent approaches" of various Courts of Appeals to this important constitutional issue; *see Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 300 (1986) ("The importance of the case, and the divergent approaches of other courts to the issue, led us to grant certiorari . . . ."); or because of the obvious "apparent conflict" between the decision below, and decisions of one or more Courts of Appeals. *See, e.g., English v. General Elec-*

tric Co., 496 U.S. 72, 78 (1990) (certiorari granted to review decision of Fourth Circuit "[b]ecause of an apparent conflict with a decision of the First Circuit"); *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 516 (1994) (certiorari granted "[b]ecause of an apparent conflict among the Courts of Appeals"); *Rogers v. United States*, 422 U.S. 35, 36 (1975) (same); *United States v. Maze*, 414 U.S. 395, 397-98 (1974) (same). Furthermore, given the importance of the constitutional question presented, certiorari would be warranted even if the precise issue had not previously been considered. *See Begier v. IRS*, 496 U.S. 53, 57 n. 2 (1990) (granting certiorari even though "[n]o other Court of Appeals had decided a case that presents the precise issue we decide here.").

The Respondents' erroneous view of what constitutes a conflict, is compounded by their fundamental misunderstanding of several cases relied on by Petitioner.

For example, the Respondents claim that Petitioner "incorrectly cites [*Peter Kiewit Sons' Co. v. United States Army Corps of Engineers*, 714 F.2d 163 (D.C. Cir. 1983)] as a case *applying* the appearance of impropriety standard." (Emphasis added.) Brief in Opposition 26. The Respondents' discussion of that case is demonstrably wrong on two counts.

First, Petitioner *did not* claim that *Peter Kiewit Sons'* "applied" an appearance of impropriety standard. Petitioner cited that case as one of many cases that has "either expressly or implicitly recognized" the distinction between quasi-judicial (adjudicative) proceedings and quasi-legislative (rulemaking) procedures. Pet. for Cert. 34. Petitioner stands by that assertion.

Second, Respondents have misconstrued the *Peter Kiewit Sons'* decision. In their brief, the Respondents state that in *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972), the court, "in dicta, said that if it had involved a quasi-judicial decision, such a decision could have been invalidated solely on the basis of an appearance of bias or pressure." Brief in Opposition 26. That statement is an accurate reference to *D.C. Federation*. Yet in the very next sentence of their brief, the Respondents state: "The *Kiewit* court *expressly disavowed* such a standard." (Emphasis added.) Brief in Opposition 26.

The *Peter Kiewit Sons'* court did no such thing, as evidenced by this quotation:

> Since the Secretary [of Transportation]'s action in that [*D.C. Federation*] case was not judicial or quasi-judicial, the [*D.C. Federation*] court noted that the test for improper interference was whether the congressional action *actually* affected the decision. The [*D.C. Federation*] court indicated that if the decision had been judicial or quasi-judicial, it could be invalidated by "the appearance of bias or pressure." Under this standard, pressure on the decisionmaker alone, without proof of effect on the outcome, is sufficient to vacate a decision.

(Emphasis in original.) *Peter Kiewit Sons', supra*, 169. Rather than "expressly disavow" an "appearance of bias or pressure" standard, as Respondents mistakenly claim, *Peter Kiewit Sons'* cited *D.C. Federation*'s "appearance of bias or pressure" standard (for judicial or quasi-judicial actions), *with approval*. Petitioner's understanding of *Peter Kiewit Sons'* is reinforced—if reinforcement is needed—by the very

next sentence in the decision, which states: "In *either context* [i.e., under either standard], the proper focus is not on the content of congressional communications in the abstract, but rather upon the relation between the communications and the adjudicator's decisionmaking process." (Emphasis added.) *Peter Kiewit Sons'*, *supra*, 169-70. Thus, *Peter Kiewit Sons'*, which involved purely "discretionary" proceedings for debarment of a government contractor, *see id.*, 168, did not (and had no need to) *apply* an appearance of bias standard. But it acknowledged that such a standard *was* a cognizable standard in the District of Columbia Circuit for judicial or quasi-judicial administrative proceedings; and that under either standard (actually influenced or appearance of bias), courts necessarily must focus on the relationship between "the communications and the adjudicator's decisionmaking process." *Id.*, 169-170.

The Respondents are equally wrong in their description of *ATX, Inc. v. United States Department of Transportation*, 41 F.3d 1522 (D.C. Cir. 1994). The *ATX* decision not only is filled with approving references to the "appearance" standard; *see id.*, 1527-28 (because the certificate proceeding was quasi-judicial, "we must determine whether congressional interference occurred, *or appeared to*, to such an extent as to compromise the administrative process") (Emphasis added.); *id.*, at 1529 ("There is a strong potential for an *appearance of impropriety* in allowing congressional opinion testimony in a quasi-judicial proceeding . . . .") (Emphasis added.); but the court *decided* the case by applying both an "appearance of impropriety" standard and an "actually affected" standard. *See, id.*, at 1527 ("we conclude that the congressional input neither created *an appearance of impropriety* nor *actually affected* the outcome") (Emphasis

added.); *id.*, at 1529 ("the testimony here falls far short of creating a *fatal appearance of bias*") (Emphasis added.). In short, the Respondents' claim of "no conflict" is based on a distorted view of the relevant case law.

B. A Biased Decisionmaker is Never Harmless

Petitioner has not challenged the merits of the Reconsidered Final Determination, but only the fairness of the process by which that decision was reached. The Respondents, however, have raised the specter of harmless error, i.e., arguing that "even if the RFD were to be judged against an appearance of bias standard, the STN's claims would fail." Brief in Opposition 30.

In advancing such a suggestion, the Respondents' fail to appreciate that the question of whether a decisionmaker is biased, or appears to be biased—whether from political pressure or any other factor—is a question involving a "structural defect" that is not subject to harmless error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 307-310 (1991) (while most "trial errors" are subject to harmless error analysis, "structural defects," which "affec[t] the framework within which the trial proceeds," are not). *See also, Rivera v. Illinois*, 556 U.S. __ 129 S.Ct. 1446, 1455-56 (2009) ("'Among those basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury.'") (internal quotation marks omitted); *Gomez v. United States*, 490 U.S. 858, 876 (1989) (same).

Harmless error principles that are applicable in federal criminal and civil cases generally, are also applicable in the administrative arena. *See Shinseki v. Sanders*, 129 S. Ct. 1696, 1704-06 (2009); *National*

Association of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 659-60 (2007). Because the Petitioner's claim involves a structural defect, harmless error considerations have no place in this case.

C. An Appearance Standard is Proportionate to the Interests at Stake

In their brief, the Respondents repeatedly remind the Court that Petitioner was not able to *prove*, in the courts below, that political pressure *actually* influenced the RFD, inasmuch as the deposed Interior Department officials testified that they were not influenced by political pressure:

—"Indeed, the uncontroverted testimony of the Interior Department officials deposed by the STN is that they were not influenced by any of the alleged political pressure." Brief in Opposition 16;

—"Moreover, the Interior officials uniformly testified that they were not influenced by these criticisms and communications." *Id.*, 17;

—"Moreover, other Interior Department officials, including the actual decision maker [James] Cason, testified that no one told them about the threat [by Congressman Frank Wolf to tell the President that Secretary of the Interior Gale Norton should be fired] and that they knew little or nothing about the meetings."[1] *Id.*;

—"Most importantly, each of the Interior officials testified that none of the congressional criticisms had any influence or effect on the RFD." *Id.*;

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[1] Norton testified at her deposition that Cason, as part of her leadership team, would have heard about the threat. Pet. for Cert. 25-26.

—"Moreover, the Interior Department officials testified in depositions taken by the STN that none of these actions had any influence over the decision making resulting in the RFD." *Id.*, 18.

The power of denial by Government officials provides further justification for this Court to grant certiorari to consider whether the Due Process Clause requires evaluation of a political influence claim under an appearance of bias standard. When this case was decided in the District Court, on the basis of cross-motions for summary judgment, the District Court was required to draw all reasonable inferences against the Respondents (and Federal Defendants) when ruling on their cross-motions for summary judgment. However, the District Court ruled that it "must accept the evidence presented at face value, in particular the testimony by the agency decisionmakers that they were not unduly pressured by particular politicians or the political climate at large." App. to Pet. for Cert. 38a.

The Members of the Court should not ignore, as Justices, what they know as men and women. *See United States v. Maze*, *supra*, 403 n. 7 ("Since we are admonished that we may not as judges ignore what we known as men. . . ."). "[I]t would be naïve to think that abuses of power never take place or that government agencies never accede to strong political pressure." *Sokaogon Chippewa Community (Mole Lake Band of Lake Superior Chippewa) et al. v. Babbitt*, 961 F. Supp. 1276, 1281 (W.D.Wis. 1997). Political appointees are unlikely to admit having been subjected to (or worse, having yielded to) political pressure. A standard that is satisfied only by proof of the "actual influence" of political pressure, is

hardly commensurate with the Due Process right to a fair adjudicative hearing.

D. *Caperton*: The "Appearance," "Risk," "Potential" or "Probability" of Bias

The Petitioner has phrased the question presented in terms of an "appearance of bias" or "appearance of impropriety" standard, because those standards have been applied or endorsed in the decisions of other Circuits on which the Petitioner relies. *See* Pet. for Cert. 34-36. All of those decisions, of course, predate this Court's most recent pronouncement regarding a potentially biased decisionmaker. *See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. __, 129 S. Ct. 2252 (2009). There, the Court held that in certain circumstances Due Process may be violated by a serious or substantial "risk of actual bias," by a "probability of actual bias," or by an "unconstitutional 'potential for bias.'" *Id.*, 2257, 2259, 2262-2265.[2]

Although *Caperton* involved the issue of judicial recusal, it is highly instructive here. Due Process may require judicial recusal in only a limited number of situations, but Due Process *always* requires a fair hearing before an unbiased adjudicator. If, post-*Caperton*, the probability of bias is sufficient in extreme cases to require judicial recusal on constitutional grounds, how can a Federal Court of Appeals, post-*Caperton*, insist on a rigorous "actually influenced" standard as the *minimum* standard that a

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[2] In a dissenting opinion, Chief Justice Roberts (joined by Justices Scalia, Thomas, and Alito), seemed to acknowledge the close relationship between a "probability of bias" and an "appearance of bias." *See id.*, 2268 ("there are a number of factors that could give rise to a 'probability' or 'appearance' of bias").

Petitioner must satisfy when asserting a Due Process claim of undue political influence at a quasi-judicial (adjudicative) proceeding? Stated another way, if a probability of bias is sufficient in extreme cases to require judicial recusal on Due Process grounds, then *no greater burden* should be placed on a litigant seeking to prove that a quasi-judicial administrative proceeding was constitutionally unfair due to political pressure. And, as already pointed out, other Courts of Appeals had already determined, even prior to *Caperton*, that the appropriate burden for such proceedings was the appearance of bias or impropriety.

E. Did the Second Circuit Consider *Caperton*?

The *Caperton* decision was released on June 8, 2009, the same day that the Petitioner filed its Reply Brief in the United States Court of Appeals for the Second Circuit. Petitioner's counsel subsequently submitted a letter to the Clerk of the Second Circuit, pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, notifying the court of the *Caperton* decision, and of its claimed relevance to this case. The Federal Defendants thereafter sent a Rule 28(j) letter to the court, arguing, inter alia, that "*Caperton*'s "probability of actual bias" standard was "much higher than a mere 'appearance of bias.'" Letter to Catherine O'Hagan Wolfe, Clerk of Court, from Assistant United States Attorney John B. Hughes, p. 1 (Oct. 2, 2009).

The *Caperton* decision was neither discussed nor cited in the Second Circuit's opinion rejecting Petitioner's claims on appeal. App. to Pet. for Cert. 68a-75a. Consequently, it cannot be known whether, or to what extent, the Second Circuit ever considered it. Although Petitioner is seeking a formal grant of certiorari, Petitioner simply notes that the Court

does have the power to issue a "GVR" order, which involves granting certiorari, vacating the judgment, and remanding for further consideration. *See Lawrence v. Chater*, 516 U.S. 163, 165-170 (1996) (discussing considerations that guide the Court's exercise of its GVR power); *Stutson v. United States*, 516 U.S. 193, 194-197 (1996). As noted in *Lawrence v. Chater*, *supra*, the GVR power has been used where an "intervening" decision of the Court may call into question the decision of a Court of Appeals. *Id.*, 166-167. In *Lawrence*, the Court noted that in *Robinson v. Story*, 469 U.S. 1081 (1984), the Court "GVR'd for further consideration in light of a Supreme Court decision rendered almost three months *before* the summary affirmance by the Court of Appeals that was the subject of the petition for certiorari." (Emphasis in original.) *Lawrence v. Chater*, *supra*, 169. *See also id.*, at 184 (Scalia, J., with whom Thomas, J., joins) (noting that in *Stutson v. United States*, *supra*, the intervening decision leading to the GVR order "had been on the books for well more than a year before the Eleventh Circuit announced the judgment under review, and for almost two years before that court denied rehearing"). In this case, the *Caperton* decision was issued a little more than four months before the Court of Appeals' affirmance (on Oct. 19, 2009). Since the Second Circuit's *per curiam* opinion does not reveal "whether or how it considered a precedent of [this Court] that the District Court had no opportunity to consider," *Lawrence v. Chater*, *supra*, 169, a remand to the Second Circuit for further consideration in light of *Caperton*, also would appear to be "an appropriate exercise of [the Court's] discretionary certiorari jurisdiction." *Id.*, 166.

CONCLUSION

For the reasons set forth in the Petition for a Writ of Certiorari, and in this Reply Brief, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

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No. 09-1433

IN THE

Supreme Court of the United States

SCHAGHTICOKE TRIBAL NATION,
Petitioner-Appellant,

v.

KEN L. SALAZAR, Secretary, Department of the Interior, JAMES E. CASON, Associate Deputy Secretary, Department of the Interior, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, and INTERIOR BOARD OF INDIAN APPEALS,
Respondents-Appellees.

THE KENT SCHOOL CORPORATION, STATE OF CONNECTICUT, TOWN OF KENT, and THE CONNECTICUT LIGHT AND POWER COMPANY,
Intervenors-Appellees.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

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IN THE

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v.

KEN L. SALAZAR, Secretary, Department of the Interior, JAMES E. CASON, Associate Deputy Secretary, Department of the Interior, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF FEDERAL ACKNOWLEDGMENT, and INTERIOR BOARD OF INDIAN APPEALS,
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THE KENT SCHOOL CORPORATION, STATE OF CONNECTICUT, TOWN OF KENT, and THE CONNECTICUT LIGHT AND POWER COMPANY,
Intervenors-Appellees.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on October 4, 2010, and (2) granting the petition.

* * * *

Several years ago, the Court ruled that a citizen detained in the United States as an "enemy combatant" is entitled to a "fair opportunity to [be heard] before a neutral decision-maker." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). One would hope that a "state-recognized tribe of Indians who possess a state-recognized reservation," *Schaghticoke Tribal Nation v. Harrison*, 264 Conn. 829, 831, 826 A.2d 1102 (2003), and whose individual members were accorded full state citizenship status in 1973, see Conn. Gen. Stat. § 47-59a(a), would not be viewed as an "enemy" of that state during the Tribe's pursuit of federal acknowledgment. Yet that is essentially an apt description of how Connecticut politicians (state and federal) treated the Schaghticoke Tribal Nation in the period between January 29, 2004—the day the Principal Deputy Assistant Secretary–Indian affairs issued a Final Determination acknowledging the Tribe within the meaning of federal law, see 69 Fed. Reg. 5570 (Feb. 5, 2004)—and October 11, 2005, the day a politically-appointed Associate Deputy Secretary of the Department of the Interior issued a Reconsidered Final Determination declining to acknowledge the Tribe under federal law. See 70 Fed. Reg. 60101 (Oct. 14, 2005).

The politicians who opposed the Tribe's acknowledgment, asserted that their opposition was based on concerns that the criteria for federal acknowledgment, see 25 C.F.R. Part 83, were not being strictly enforced. But other motivations for the political opposition may have been the fear that if the Schaghticoke Tribal Nation achieved federal acknowledgment, it might prevail in certain land claim actions and might seek to open a gaming casino in Connecticut—which potentially could jeopardize the

state's billion-dollar revenue stream from the state's two existing casinos.[1]

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[1] It is not clear whether, or to what extent, a third federally recognized tribe could engage in gaming activities. Nevertheless, the current financial arrangement between two tribes and the State, may operate as a powerful disincentive to allow any alteration in Connecticut's tribal landscape.

Foxwoods Resort Casino is operated by the Mashantucket Pequot Tribal Nation, which was recognized by Congress in 1983. *See* 25 U.S.C. § 1751 et seq. The Mohegan Sun Casino is operated by the Mohegan Tribe, which was acknowledged through the federal administrative process in 1994. *See* 59 Fed. Reg. 12140 (March 15, 1994). Each tribe signed a Memorandum of Understanding, pursuant to which 25% of net slot machine revenues are "contributed" to the State of Connecticut. "Since 1993, the [Mashantucket Pequot] Tribe has given more than $3 billion to Connecticut under this agreement." www.mashantucket.com/TribalCommitments.aspx (last visited Oct. 26, 2010). *See* State of Connecticut, Division of Special Revenue, Schedule of Selected Video Facsimile/Slot Machine Data for Foxwoods Casino, at www.ct.gov/dosr/FosltWeb.pdf (last visited Oct. 26, 2010). Since 1996, the Mohegan Tribe has contributed approximately $ 2.5 billion. *See id.*, at www.ct.gov/dosr/lib/dosr/MosltWeb.pdf (last visited Oct. 26, 2010). The Mohegan Tribe's website notes that "both the Mohegan Sun and the state's other Indian casino[,] in giving 25% of all slot revenues to the State, represent the state of Connecticut's *single largest source of revenue* other than the federal government." (Emphasis added.) www.mohegan.nsn.us/government/enterprisesDetails.aspx?e=Mohegan%20Sun (last visited Oct. 26, 2010).

The Mashantucket Pequot Tribe's Memorandum of Understanding contains this provision: "The Tribe agrees that, so long as no change in State law is enacted to permit the operation of video facsimiles or other commercial casino games by any other person and no other person within the State lawfully operates video facsimiles or other commercial casino games, the Tribe will contribute to the State a sum [the "Contribution"] equal to twenty-five per cent (25%) of gross operating revenues of video facsimile games operated by the Tribe. For purposes of this

In filing the Petition for Writ of Certiorari, the Tribe's modest goal was to gain the *opportunity* to have its "political influence" claim reviewed under a particular legal standard. In the District Court for the District of Connecticut, and in the United States Court of Appeals for the Second Circuit, the Tribe asserted that its due process right to a fair administrative *adjudicative* determination had been violated by undue political influence, as evidenced by various (and at times undisputed) acts of political pressure, influence, or intimidation, all aimed at defeating the Tribe's petition for federal acknowledgment. See Pet. for Cert., at 18-29 (summarizing the political activities). The Tribe sought to have its political influence claim reviewed *not only* under an "actual influence" standard, but under an "appearance of bias" standard as well. However, the District Court failed to review the political influence claim under the "appearance of bias" standard, and the

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paragraph, gross operating revenues shall be defined to mean the total sum wagered less amounts paid out as prizes." Memorandum of Understanding between the State of Connecticut and the Mashantucket Pequot Tribe (Jan. 13, 1993) ¶ 1, as amended by the Second Amendment to Memorandum of Understanding (April 25, 1994), at www.ct.gov/dosr/cwp/view.asp?a=2031&q=293150&dosrPNavCtr=%7C42785%7C (last visited Oct. 26, 2010). The Memorandum further provides: "In the event that any change in State law is enacted to permit the operation of video facsimiles or other commercial casino games by any other person or any other person within the State lawfully operates video facsimile games or other commercial casino games, the Tribe shall not be bound by the provisions of this Memorandum of Understanding . . . ." *Id.*, ¶ 3 (as amended April 25, 1994). The Memorandum of Understanding between Connecticut and the Mohegan Tribe contains similar provisions. See www.ct.gov/dosr/cwp/view.asp?a=2031&q=421838&dosrPNavCtr=%7C43105%7C.

Second Circuit expressly refused to apply it. See *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 134 n. 1 (2009) ("we reject the Schaghticoke's argument that we should apply a broader 'appearance of bias' standard in this action"). Accordingly, the Second Circuit reviewed the political influence claim *solely* under an "actual influence" standard. "'To support a claim of improper political influence on a federal administrative agency, there must be some showing that the political pressure was intended to and did cause the agency's action to be influenced by factors not relevant under the controlling statute.") *Id.*, at 134 (quoting *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185 (2nd Cir. 1984)). In the three cases in which the Second Circuit has utilized the *Orangetown* standard, i.e., in *Town of Orangetown*, supra, in *Chemung County v. Dole*, 804 F.2d 216, 222 (2nd Cir. 1986), and in this case, the Second Circuit has applied the standard without distinguishing between *adjudicative* and non-adjudicative agency proceedings, contrary to the approach of other Circuits. See Pet. for Cert., at 33-37; Pet. Reply Br., at 2-6.

This Court issued its decision in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. ___, 129 S. Ct. 2252, on June 8, 2009, the same day that Petitioner filed its Reply Brief in the Second Circuit. The parties thereafter informed the Second Circuit by letter of the *Caperton* decision, and of its claimed relevance (in Petitioner's view) or very limited or non-relevance (in the view of Petitioner's opponents) to the issues. The Second Circuit's opinion in this case, which was released on October 19, 2009 (11 days after oral argument), and amended on November 4, 2009, does not cite *Caperton*.

Although the *Schaghticoke* case does not involve judicial disqualification, the *Caperton* decision is nevertheless highly relevant. The principles that animate *Caperton* support the Tribe's contention that its "political influence" claim should be reviewed under an "appearance of bias" standard—a standard often recognized, even prior to *Caperton*, by federal courts when reviewing claims of undue political influence on federal adjudicative proceedings.

As a threshold matter, *Caperton* is seen as having effected a significant change in due process jurisprudence. See, e.g., *State v. Allen*, 778 N.W.2d 863, 880, 904 (Wis. 2010) (per curiam) ("All state courts are bound by the teachings of *Caperton*, and *Caperton* is generally viewed as a major case involving more than campaign contributions and affecting court practice across the country."; "One need not understand the furthest implications of the decision to know that these implications will be significant."); *People v. Freeman*, 222 P.3d 177, 182 (Cal. 2010) ("*Caperton* both reviewed the court's jurisprudence in this area and extended it.").

Of course, it may take many years before the full contours and ramifications of the *Caperton* decision are known. See *State v. Allen*, supra, 880 ("How should the principles articulated in *Caperton* be applied in different factual settings? Answering this question is no easy task . . . .") As the *Allen* court stated, "[a]n outpouring of literature and commentary discussing a 'post-*Caperton*' landscape has already begun. State courts, and most immediately our own, are on the front lines of resolving the boiling and at times contentious uncertainty.") (footnote omitted). *Id.*, 904-905. "In the end, *Caperton* is a provocative case as much for the questions it does not

answer as for the one it does." Comment, "*Caperton v. A. T. Massey Coal Co.*: Due Process Limitations on the Appearance of Judicial Bias," 123 Harv. L. Rev. 73, 78 (2009).

The Petitioner does not have the luxury of waiting to see whether, and how, *Caperton* may apply in different settings. Two lawsuits brought by the Tribe (in 1998 and 2000) seeking restoration of reservation land, and one lawsuit filed by the United States (in 1985) seeking to condemn a portion of the reservation land for government use, have been stayed by the District Court pending the resolution of the Tribe's petition for federal acknowledgment. The Tribe urges the Court to act favorably on this petition, so the Court may consider whether *Caperton* requires a federal court to evaluate, under an "appearance of bias" standard, a claim of undue political influence on a federal adjudicative proceeding.

For present purposes, the fundamental question arises: Is a "risk of actual bias," or a "probability of actual bias," or an "unconstitutional 'potential for bias,'" the functional equivalent of an "appearance of bias" or "appearance of impropriety?"

Undeniably, there is a very close relationship between some of these concepts. See *Caperton*, supra, 2268 (Roberts, *C.J.*, jointed by Scalia, Thomas, and Alito, *Js.*, dissenting) ("there are a number of factors that could give rise to a 'probability *or* 'appearance' of bias") (Emphasis added.). See also, Pamela S. Karlan, "Comment: Electing Judges, Judging Elections, and the Lessons of *Caperton*," 123 Harv. L. Rev. 80, 98 (Nov. 2009) ("...*Caperton* involves a complex jurisprudence of appearance. Justice Kennedy framed the issue as whether there was a 'serious risk of actual bias – based on objective and reasonable

perceptions.' That final clause means that, although Justice Kennedy later distinguished between federal constitutional requirements and state recusal standards that focus on 'the appearance of partiality,' his proposed standard was also based on appearances: how do outside observers assess the likelihood of bias or prejudgment?") (footnotes omitted.). See also, Terri R. Day, "Buying Justice: *Caperton v. A.T. Massey*: Campaign Dollars, Mandatory Recusal and Due Process," 28 Miss. C. L. Rev. 359, 370 (2009) (discussing questions asked at the *Caperton* oral argument about the related concepts of "probability of bias" and "appearance of bias").

There are very recent cases, and commentary, that touch on the question of whether *Caperton* supports the proposition that the "appearance of bias" or impropriety may violate a litigant's right to due process of law.

At least one state supreme court has expressed the view that *Caperton* did not endorse an appearance of bias standard for judicial disqualification as a matter of federal due process. See *People v. Freeman*, 222 P.3d 177, 178, 184 (Cal. 2010) (reviewing *Caperton*, and concluding that the "mere appearance of bias" is not sufficient to require judicial disqualification as a matter of federal due process). But several courts and jurists have, either explicitly or implicitly, suggested the opposite. See e.g., *Rissler v. Jefferson County Board of Zoning Appeals*, 693 S.E.2d 321, 328 (W. Va. 2010) (per curiam) (post-*Caperton* decision stating, inter alia, that "the *appearance of justice* may require the disqualification of an adjudicator, even when the adjudicator does not have an actual interest in a matter over which he/she presides") (Emphasis added.); *Wersal v. Sexton*, 613 F.3d 821, 845 (8th Cir.

2010) (Bye, *J.*, dissenting) ("Our law dictates that a *mere appearance of bias*, without a showing of actual bias, *is sufficient* in some circumstances to violate the due process rights of litigants. See *Caperton v. A.T. Massey . . . .*") (Emphasis added.); *Brady et al. v. Attorney Grievance Commission*, 486 Mich. 997, 1014 n. 10 (2010) (Weaver, J.) ("'The test for determining whether an *appearance of impropriety* exits *as laid out* in *Caperton* . . . is 'whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.'") (quoting *Caperton*, at 2255) (Emphasis added.); *City of Manassa v. Ruff*, 235 P.3d 1051, 1057 (Colo. 2010) (en banc) ("It is, in fact, the rare situation that objectively poses such an *appearance of or* actual conflict of interest that due process compels disqualification.") (citing to *Caperton*, at 2259, 2267, for the stated proposition) (Emphasis added.). See also, *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010) (Stevens, Ginsburg, Breyer, and Sotomayor, *Js.*, concurring in part and dissenting in part) ("'The difficulties of inquiring into actual bias,' we further noted [in *Caperton*], 'simply underscore the need for objective rules,' *id.*, at ___, 129 S. Ct. 2252, 173 L. Ed. 2d 1208—rules which will perforce turn on *the appearance of bias* rather than its actual existence.") (Emphasis added.).

Caperton involved "extreme facts" and an "extraordinary situation." See *Caperton*, supra, 2265. But this case, too, involves extremes—of political intimidation and manipulation. This case includes a threat by a powerful Congressman against a Secretary of the Interior who had participated in the process leading to the decision to acknowledge the Schaghticoke Tribal Nation, see Pet. for Cert., at 24-26, and

this also is a case in which the Federal District Court Judge who was supervising the acknowledgment process for Petitioner, wrote a *private* letter to the Governor of Connecticut. See Pet. for Cert., at 27 (assuring the Governor that her "frustration and impatience is fully warranted," and stating that the judge's action in granting a final extension of time to the Tribe, "reflects a caution intended to avoid a reversal by another Court which might buy a due process argument."). Such "political" actions undermine the confidence of the individual litigant, and of the public, in the integrity of our justice system. See *Free Enterprise Fund and Beckstead and Watts, LLP v. Public Company Accounting Oversight Board et al.*, 130 S. Ct. 3138, 3174-3175 (2010) (Breyer, *J.*, with whom Stevens, Ginsburg, and Sotomayor, *Js.*, join, dissenting) ("'[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they *appear to the public to be avoiding it*, if confidence in the system of representative Government is not to be eroded to a disastrous extent.'") (Emphasis added.).

In films depicting the old West, an oft repeated cry was "let's give him a fair trial, then we'll hang him."[2] In this case, the Schaghticoke Tribal Nation believes that the first step was omitted.

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[2] The phrase appears in various forms. See, e.g., *Frost v. State*, 314 S.W.2d 33, 38 (Tenn. 1958) (Swepston, *J.*, concurring in the result) (noting the "former law west of the Pecos, where the general principle was "Give the rascal a fair trial and then hang him."). In a 1985 film, *Silverado*, the following line is used: "We're gonna give you a fair trial, followed by a first class hanging." See www.imdb.com/title/tt0090022/quotes (last visited Oct. 26, 2010).

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for a Writ of Certiorari, and in the Petitioner's Reply Brief, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, and grant the Petition and review the judgment and opinion below or, in the alternative, grant the Petition, vacate the judgment, and remand for further consideration.

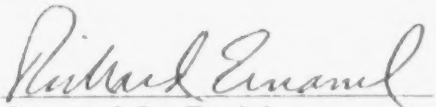
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CERTIFICATE OF COUNSEL

As counsel for the Petitioner I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.



Counsel for Petitioner

October 29, 2010